Supreme Court, U.S.
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No. _____

In The Supreme Court of the United States

SARA ELIZABETH LILLY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVEIW

I DID RESPONDENT OWE PETITIONER, A 17 YEAR OLD FEMALE UNDERAGE POTENTIAL ARMY RECRUIT, AN AFFIRMATIVE DUTY TO PROTECT HER FROM HARM WHILE SHE WAS IN RESPONDENT'S CARE, AND DID RESPONDENT OTHERWISE "TAKE CHARGE" OF PLAINTIFF, BECAUSE SHE WAS A MINOR, SUCH AS TO CREATE A SPECIAL RELATIONSHIP WHICH ALSO PLACED A DUTY UPON RESPONDENT TO PROTECT PETITIONER FROM HARM WHILE SHE WAS IN RESPONDENTS CARE AND CUSTODY?

II UNDER *SHERIDAN V UNITED STATES*, 487 U.S. 392 (1988), WERE RESPONDENT'S EMPLOYEES NEGLIGENT IN ALLOWING ANOTHER GOVERNMENT EMPLOYEE TO COMMIT A FORESEEABLE ASSAULT AND BATTERY AGAINST PETITIONER, AND WAS THIS ENTIRELY INDEPENDENT OF THE ASSAILANT'S EMPLOYMENT STATUS WITH RESPONDENT, OR ARE THE CLAIMS OF PETITIONER, BARRED BY 28 U.S.C. § 2680(H)?

LIST OF ALL PARTIES TO THE PROCEEDING

Sara Elizabeth Lilly, *Petitioner.*

The United States of America, *Respondent.*

CORPORATE DISCLOSURE STATEMENT

Neither Petitioner or Respondent are Incorporated entities.

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The orders at issue in this appeal are as follow: (1) The "OPINION AND ORDER" and "JUDGMENT ORDER" of the United States District Court for the Southern District of West Virginia dated May 11, 2001, which granted the United States Motion to Dismiss [Appendix 3-12]; and (2) The Order of the 4th Circuit Court of Appeals dated December 20, 2001, which affirmed the ruling of the United States District Court [Appendix 1 and 2].

JURISDICTION

1. Jurisdiction is asserted against the United States of America (USA) pursuant to 28 U.S.C. § 1346, more commonly known as the Federal Tort Claim Act. In addition, 28 U.S.C. § 2671-2680 confers subject matter jurisdiction "of civil actions of claims against the U.S.A. . . . for money damages . . . or personal injury counsel by the negligent or wrongful act or omission of any employment of the Government while acting within the scope of his office or employment. . . ."

2. This Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

As stated above, 28 U.S.C. § 2671-2680 confers subject matter jurisdiction "of civil actions of claims against the U.S.A. . . . for money damages . . . or personal injury counsel by the negligent or wrongful act or omission of any employment of the Government while acting within the scope of his office or employment. . . ."

STATEMENT OF THE CASE

The United States District Court entered an order which stayed any discovery from taking place in this case when the Respondent filed its motion to dismiss [App. 15 and 16]. Therefore, all factual evidence which was submitted to the District Court to decide this case was submitted via the affidavits of the Petitioner [App. 27-30]; her mother, Pamela Lilly [App. 31-21] and Randy West, the Kanawha County Deputy Sheriff who investigated Petitioner's sexual assault [App. 34-94].

For years, Respondent, The United States Army, has encouraged its youth to join the United States Army so that they can "be all that you can be" and receive money for a college education. This encouragement comes to our youth in the form of TV, radio and magazines ads, and through Army Recruiters stationed throughout the United States. The recruiting efforts appeal to high school drop outs and high school graduates who otherwise could not afford to continue their education, and who may or may not have reached the age of majority. Such was the case for Petitioner, Sara Elizabeth Lilly, who a potential Army Recruit, and was a 17 year old high school dropout, when an Army Recruiter, Sergeant Mark A. Clifford [hereafter Clifford], tried to recruit her and took her to a bar, and in the presence of fellow Army recruiters: 1) bought alcoholic beverages for Petitioner; 2) allowed Petitioner to drink to the point of unconsciousness; and 3) then put her in a government vehicle and left the bar when he himself had been drinking alcoholic beverages, and took her to a motel, where, while Petitioner was unconscious and helpless, he raped her.

Petitioner, turned to Respondent to put her on the right track for the future. In early 1997, Petitioner dropped out of high school and soon realized the error of what she had done and contacted the Army Recruiting Office in South Charleston, West Virginia, since she believed the best way for her to obtain her education was to join the Army. The Army recruiter whom Petitioner spoke with was Clifford and she told him that she was seventeen (17), a high school drop out and she wanted to join the Army [See App. 27-30 and 31-33].

Throughout the entire time of events set forth herein, Clifford was a married man [App. 42, 50 and 117].

In Clifford's efforts to recruit Petitioner he called her at home, and came to Petitioner's mother's home on at least one occasion. Sergeant Clifford also made arrangements for Petitioner to take her GED, since this was a requirement for entering the Army, and he even offered to take her to the GED test he said was scheduled for December 30, 1997 [App. 27-30 and 31-33].

During the early afternoon hours of December 30, 1997, Petitioner's mother dropped her daughter off at a local Public Library at 1:00 p.m., where Clifford met them, ostensibly to take her to her GED test [App. 43 and 89]. Clifford used a Government vehicle to pick Petitioner up and was wearing clothing that had "ARMY" written on it [App. 27-30]. Upon arriving at the GED testing center, Petitioner discovered it was closed [App. 43 and 89], and it was then Clifford took Petitioner to lunch and to a movie [App. 89-90].

After the movie, Clifford suggested he take Petitioner for a drink [App. 92], and he drove her in the same government vehicle in Army attire to Griff's, a restaurant/bar located in South Charleston, West

Virginia. Upon arriving at the restaurant/bar, Clifford saw several fellow Army recruiters, some of whom were in uniform [App. 28]. Even Clifford's boss, Sergeant First Class Raymond D. Adkins, admits to seeing Petitioner with Clifford that night [App. 136].

While at Griff's, Clifford purchased numerous alcoholic drinks for Petitioner, which she drank and caused her to get so drunk that she laid her head on the bar, vomited on herself, and passed out [App. 29 and 96]. Clifford also drank numerous alcoholic drinks that night [App. 94].

Sergeant First Class Charles L. Blevins, who worked with Clifford, was also at Griff's that night and observed Clifford with Petitioner and observed the state of intoxication Petitioner was in [App. 63-64]. Sergeant Blevins witnessed Clifford and a waitress carrying Petitioner out of the bar. Once outside, Blevins saw Petitioner be put in a white government jeep with Clifford and he actually chased Clifford down to inquire about whether Petitioner was okay [App. 51 and 65]. Thereafter, Sergeant Blevins thought the incident warranted being reported to Sergeant Adkins, and he did so when he arrived home [App. 65]. Blevins took no action to prevent Clifford from leaving the bar with an obviously much younger, intoxicated, unconscious female in a government vehicle at 10:00 p.m. at night when Sergeant Clifford had also been drinking.

Upon leaving Griff's, Clifford took Petitioner to a motel room, showered her off, and raped her [App. 41, 97-99 and 145]. The next morning, Clifford took Petitioner to the home of a friend and left her there at approximately 9:00 a.m. [App. 109]. That same day, Petitioner went to the hospital, where low levels of spermatozoa where found on the sweat pants she had on [App. 146].

Records indicate Clifford had attempted in October of 1997, just two months before Petitioner was sexual assaulted, to get another potential female Army recruit, 18 year old, Kim Cooper, to have drinks with him and then he made sexual advances toward her by attempting to touch her breasts and buttocks, and twisted her arm and pulled her hair [App. 52-53 and 122-133].

In addition, records indicate that Clifford's superior officer had had previous behavioral problems with Sergeant Clifford and described him as being "very quirky" [App. 42 and 44-45]. Nevertheless, despite this, no action was taken against Sergeant Clifford prior to his raping Petitioner.

In paragraph 14 of Petitioner's Complaint [App. 21-23], she pled the United States of America owed six (6) separate duties to her because she was a 17 year old underage potential female Army recruit, all of which duties would have arisen out of duties other government employees owed to her, and would have been independent of any duties which Clifford owed to Petitioner. Those duties alleged in the complaint were as follows:

> a. Screen persons who would have this responsibility, including Sergeant Mark Clifford, before they were ever allowed to assume this responsibly to make certain such person do not, by their actions or inactions, place potential recruit's health and safety at risk;

b. Continue to monitor such persons who had this responsibility and make certain they were carrying out these duties, including Sergeant Mark Clifford;

c. To determine if such persons were engaging in conduct which could jeopardize a potential recruit's health, welfare and safety, including plaintiff;

d. To have guidelines in effect concerning what recruiters could do in regard to dealing with potential Army recruits, including underage recruits, underage female recruits and which otherwise placed clear restrictions, limitations and guidelines on what an Army Recruiter can and cannot do to aid and encourage a potential recruit to join the United States Army;

e. Continue to monitor such persons to see that they are following and complying with the aforesaid guidelines and taking appropriate action against those persons if they do not comply with these guidelines; and

f. To determine if such persons were otherwise committing other negligent, careless and unlawful acts which may jeopardize the health, welfare and safe of potential underage female recruits.

ARGUMENT

I. DID RESPONDENT OWE PETITIONER, A 17 YEAR OLD FEMALE UNDERAGE POTENTIAL ARMY RECRUIT, AN AFFIRMATIVE DUTY TO PROTECT HER FROM HARM WHILE SHE WAS IN RESPONDENT'S CARE, AND DID RESPONDENT OTHERWISE "TAKE CHARGE" OF PLAINTIFF, BECAUSE SHE WAS A MINOR, SUCH AS TO CREATE A SPECIAL RELATIONSHIP WHICH ALSO PLACED A DUTY UPON RESPONDENT TO PROTECT PETITIONER FROM HARM WHILE SHE WAS IN RESPONDENT'S CARE AND CUSTODY?

By Respondent allowing Clifford to assume responsibility for Petitioner, a 17 year old underage female on December 31, 1997, Respondent created a special relationship with her and therefore the immunity it claims under 28 U.S.C.A. §2680 (h) should not apply.

Although there is no general duty under West Virginia law to protect others from harm, a duty arises when a special relationship with the victim has previously been established. Section 314A(4) of the Restatement (Second) of Torts (1965), entitled "Special Relations Giving Rise to Duty to Aid or Protect," provides that "One . . . who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other." Comment b to §314A explains that:

> The duties stated in this Section arise out of special relations between the parties, which create a special responsibility, and take the case out of the general rule. The relations listed are not intended to be exclusive, and are not necessarily the ones in which a duty of affirmative action for the . . . protection of another may be found.

Id. at 119.

The Restatement (Second) of Torts also finds in certain relations, a duty to protect others from third persons, Section 320 states that:

> One . . . who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor, (a) knows or has reason to know that he has the ability to control the conduct of the third persons, and
>
> (b) knows or should know the necessity and opportunity for exercising such control.

Id. at 130.

Comment b of § 320, explains that, "[A] child while in school is deprived of the protection of his parents or guardian. Therefore, the actor who takes custody of a prisoner or of a child is properly required to give him the protection which the custody of the manner in which it is taken has deprived him." Id. at 131.

Additionally, Restatement (Second) of Torts § 324 (a)(1965), provides that:

> One who, being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily harm caused to him by,
>
> (a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge.

Id. at 139. Comment b explains that one can be rendered helpless by virtue of his youth.

The emphasis of these sections is the fact that plaintiff is in a position of trust or helplessness with the person taking custody. Although there are no cases on point in West Virginia where these sections have been specifically applied, the legal principle embodied in these sections are consistent with West Virginia tort principles.

Further, West Virginia recognizes that "'the law imposes a higher degree of care around children.'" *Voelker v. Frederick Business Properties Co.*, 195 W.Va. 246, 465 S.E.2d 246, 256 (1995). *Accord Dailey v. Los Angeles Unified School Dist.*, 2 Cal.3d 741, 470 P.2d 360, 364 (1970) ("Adolescent high school students are not adults and should not be expected to exhibit that

degree of discretion, judgment, and concern for the safety of themselves and others which we associate with full maturity."); *Reid v. Young Men's Christian Association*, 107 Ill. App. 2d 170, 246 N.E.2d 20, 22 (1969) ("'The known characteristics of children should, however, be taken into consideration in determining whether or not sufficient care for the safety of a child has been exercised in a particular case. Accordingly, the fact that children cannot and do not ordinarily exercise the same degree of prudence and care for their own safety as adults, imposes on those by whose acts or omissions a child may be injured, the obligation of exercising more vigilance and caution than might be sufficient with respect to an adult'"); *Waugh v. Duke Corp.*, 248 F. Supp. 626, 630 (M.D.N.C. 1966) ("'. . . What is reasonable care to one class of invitees might fall short as to another. Those who invite children, who have not arrived at the age of discretion, to go upon their premises are required to exercise a relatively higher degree of care for their safety than to adults. That degree of care is commensurate with the attending facts and circumstances of each case.'"); *Allen v. United States*, 588 F. Supp. 247, 355 (D.Utah 1984), *rev'd on other grounds*, 816 F.2d 1417 (10th Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988). ("In dealing with conduct of potential danger to children, there is a duty to observe extra caution for their safety. . . .").

In recent cases, such as *Doe v. United States*, 838 F.2d 220m (7th Cir. 1988, where the courts have found that the government had a duty to protect an individual from harm, the duty was found to be based upon the nature of the service the government provided to the victim. West Virginia State cases that have examined a special relationship exception to local governmental immunity have held that:

> To establish that a special relationship exists between a local governmental entity and an individual, which is the basis for a special duty of care owed to such individual, the following elements must be shown: (1) an assumption by the local governmental entity, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the local governmental entity's agents that inaction could lead to harm; (3) some form of direct contact between the local governmental entity's agent and the injured party; and (4) that party's justifiable reliance on the local governmental entity's affirmative undertaking.

Wolfe v. City of Wheeling, 182 W.Va. 253, 387 S.E.2d 307, syl. pt. 2 (1989); cited with approval, *Fisk v. Lemons*, 201 W.Va. 362, 497 S.E.2d 339 (1997); *Walker v. Meadows*, 206 W.Va. 78, 521 S.E.2d 801 (1999).

The United States government assumed the responsibility for Petitioner by virtue of her being an underage female, minor child and a special relationship was specifically created when Clifford picked up Sara, a minor, took her to the GED exam, a requirement she had to meet to be recruited, and promised to deliver her back to her mother once the test was completed. Petitioner was particularly vulnerable by virtue of her minor status, and the government created in her a sense of trust by the fact that the United States military was assisting her with her career endeavors. Once Respondent assumed responsibility for Petitioner, it had a duty to protect her until she was delivered to a

reasonably safe place after her exam. The government breached that duty by failing to properly screen, monitor and supervise Clifford, which resulted in Petitioner becoming intoxicated, passing out and her being and sexually molested.

II. UNDER *SHERIDAN V UNITED STATES*, 487 U.S. 392 (1988), WERE RESPONDENT'S EMPLOYEES NEGLIGENT IN ALLOWING ANOTHER GOVERNMENT EMPLOYEE TO COMMIT A FORESEEABLE ASSAULT AND BATTERY AGAINST PETITIONER, AND WAS THIS ENTIRELY INDEPENDENT OF THE ASSAILANT'S EMPLOYMENT STATUS WITH RESPONDENT, OR ARE THE CLAIMS OF PETITIONER, BARRED BY 28 U.S.C. § 2680(H)?

Simply because Petitioner was assaulted and battered, does not mean her claims against Respondent are automatically barred under 28 USCA § 2680(h). The Federal Torts Claim Act allows liability against the United States "for money damages . . . for personal injury . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment . . ." 28 U.S.C.A § 1346(b). There is, however, an exception to that waiver of immunity for claims that necessarily arise out of assault and battery. 28 U.S.C.A § 2680 (h). The "arising out of" language is the issue before this Court.

In *Sheridan v. United States*, 487 U.S. 392, 108 S.Ct. 2449 (1988), this Court set forth that although the words "any claim arising out of" an assault or battery are broad enough to bar all claims based entirely on an

assault or battery, in at least some situations, the fact that injury was directly caused by an assault or battery will not preclude liability against the Government for negligently allowing the assault to occur. Id. 487 U.S. at 392, 108 S.Ct. at 2451. The intentional torts exception is inapplicable to torts that fall outside of the Federal Tort Claim Act's general waiver of the Government's immunity from liability, 487 U.S. at 392-93, 108 S.Ct. at 2451. Accordingly, the negligence of other government employees who allow a foreseeable assault and battery to occur may furnish a basis for Government liability that is entirely independent of the batterer's employment status. Id. Such is the case with Petitioner.

Since this Court made its pronouncement in *Sheridan*, Petitioner is not aware of this Court having had before it a case to specifically address what facts may allow a claim for a foreseeable assault and battery to proceed against the government. Petitioner believes, because of the peculiar facts of this case, this is such a case.

Even before *Sheridan*, Courts were holding that not all actions arising out of assault and battery are barred by § 2680(h). In *Bennett v. United States*, 803 F.2d 1502 (9th Cir. 1986), the Ninth Circuit held that plaintiff's claims for negligent hiring and supervision against the United States were not barred by § 2680(h) where students were molested by a teacher employed at a Bureau of Indian Affairs boarding school who had a criminal history of molesting children.

Then again in 1987, the Ninth Circuit held in *Kearney v. United States*, 815 F.2d 535 (9th Cir. 1987), a case where a private in the Army was a prisoner in custody for an undisclosed military violation and for rape of an enlisted woman, left the base, brought a

woman back to the base and killed her, that the immunity under the assault and battery clause of 28 U.S.C. § 2680(h) is not for the purpose of avoiding claims on the basis of respondent superior. The court found that in situations such as one where the negligence was that of the government in not properly supervising a dangerous employee, the exception to the waiver of immunity did not apply. The court in *Kearney* also cited cases from other circuits that refused to apply § 2680(h) to bar plaintiffs' claims when plaintiffs have been assaulted and battered. *See e.g. Underwood v. United States*, 356 F.2d 92 (5th Cir. 1966); and *Loritts v. United States*, 489 F. Supp. 1030 (D. Mass. 1980).

A case that lends guidance to the facts at issue in Petitioner's case is the case of *Doe v. United States*, 838 F.2d 220 (7th Cir. 1988). An unidentified attacker on an Air Force military base daycare center sexually molested children while in the care and custody of the daycare center. The parents of the children brought a cause of action against the United States under the Federal Torts Claim Act. The District Court granted the government's motion for summary judgment on the grounds that plaintiff's cause of action was barred by 28 U.S.C. § 2680 (h), the assault and battery exception. The question on appeal was whether the "arising out of" language concerning assault and battery applied to plaintiff's claim.

The court in *Doe* found that the holding of *Panella v. United States*, 216 F.2d 622 (2d Cir. 1954), that claims against the government based solely on its negligence are not barred by § 2680(h), has been uniformly followed. The court then had to ask whether the claim is barred where it is questionable whether the assailant is the government employee.

The United States argued that if a government employee was involved in the assault then the claim is barred under § 2680(h). In disagreeing with the government's position the court states that, "We respect the government's proffered approach. Its ease of application is obvious; nonetheless, it cuts too rough a path and unnecessarily thwarts apparent congressional intent. Hence, we join every court to have decided the narrow question presented here in creating a less extreme, yet unambiguous, rule." *Doe*, 838 F.2d at 222.

The court focused instead on the existence of an affirmative duty owed to the victim expressly assumed by the government. The court found that, "Where the government affirmatively assumes a duty to the victim prior to the assault, and the government breaches that duty causing injury to the victim, we cannot say that her claim arises out of the assault. Rather, it arises out of the breach of that affirmative duty." Id. at 223.

The issue becomes whether if you remove the assault from the equation, will the government's liability still exist. Responded in previous briefs field before the District Court or the Court of Appeals. The defendant in *Doe* cited numerous cases as to why plaintiff's claim should be barred. *See Sheridan v. United States*, 823 F.2d 820 (4th Cir. 1987); *United States v. Shearer*, 473 U.S. 52 (1985); *Thigpen v. United States*, 800 F.2d 393, 394 (4th Cir. 1986); *Johnson v. United States*, 788 F.2d 845 (2d Cir.), cert. denied, 479 U.S. 914 (1986); *Miele v. United States*, 800 F.2d 50 (2d Cir. 1986); *Satterfield v. United States*, 788 F.2d 395 (6th Cir. 1986); *Hoot v. United States*, 790 F.2d 836 (10th Cir. 1986); *Garcia v. United States*, 776 F.2d 116 (5th Cir. 1985). The court in *Doe v. United States*, distinguished all those cases by finding that either no affirmative duty was pled by the plaintiff or simply that no affirmative duty existed on

the part of the government to protect the plaintiff prior to the assault.[1] *Doe*, 838 F.2d at 224. In those cases, the assault itself was the only relationship the government shared with the victim. Such is not the case with Petitioner - she pled an affirmative duty on the part of Respondent, and she had a separate relationship (underage potential Army recruit) with the Government apart from the assault.

In 1995, the United States District Court for the District of Massachusetts applied the affirmative duty test in a case involving the wife of an army officer who was raped and murdered by an enlisted man while living in a military base. In *Mulloy v. United States*, 884 F. Supp. 622 (D.Mass. 1995), the court found that the United States was in a special relationship with the victim because she was both an invitee and tenant on an Army base. Because of this special relationship, the government owed the victim a duty of reasonable care. The government breached this duty of care and as such, the court found that the immunity under § 2680(h) did not apply. As stated in the opinion, the question is "whether the [government], through a breach of duty, permitted a person, employee or otherwise, to commit an intentional tort against the plaintiff." Id. at 632.[2]

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[1] Although the facts in Garcia are similar to those in the case at bar, plaintiff in Garcia failed to plead that the Government owed a duty to protect the plaintiff prior to the assault. Whether a special relationship between the plaintiff and the Government was created was never addressed by the court.

[2] Based upon its reasoning the court found that it did not matter whether the government's negligence led to an assault by a third party, or by an assault be a government employee acting outside the scope of his employment, the government could still be held liable. Mulloy at 629-630.

However, as the above cases have allowed cases of this type to proceed, rulings by numerous other Untied States Courts of Appeals Courts have held otherwise, by way of example such as in *Perkins v. United States*, 55 F. 3d 910 (4th Cir. 1995) and *Sheridan v. United States*, 969 F.2d 72 (4th Cir. 1995).

In this case Respondent was aware of previous "behavioral problems" with Clifford, who it knew was married, and knew he was "very quirky." Further, not two months before plaintiff was sexually assaulted Clifford had made sexual advances to another 18 year old female potential Army recruit.

On the very night Clifford got Petitioner drunk he did so in the presence in of his fellow recruiters, who knew that Petitioner was so drunk she had passed out and had to be physically carried out to a government vehicle to be driven by Clifford in Army attire from the bar. During this period of time, no one attempted to intervene on Petitioner's behalf, or even question the situation, except to ask if she "okay."

Clifford's fellow recruiters knew he was married and saw he was in a bar with an obviously much younger female, both of whom were drinking alcoholic beverages while Clifford was in Army attire, and Adkins admits it is not acceptable for a recruiter to purchase alcoholic beverages for a potential recruit. Nevertheless, upon entering a bar and finding Clifford, in Army attire with a much younger female, Adkins made no attempt to make inquiry about the situation or to prevent Clifford from purchasing alcoholic beverages for an underage potential recruit. It is implausible to think that Petitioner's age and status as a potential recruit would not have come up in a conversation between Clifford's fellow Army recruiters who were at Griff's that night, since people do not simply sit at a

table in a bar and stare at each other silently, especially when their buddy is a married Army recruiter.

Further, Clifford's other fellow recruiters, who knew Clifford was married, made no effort to intervene when it was obvious Clifford was with a much younger female, drinking alcoholic beverages while Clifford was in Army attire, when they could see the state of Petitioner's inebriation and that she had to be carried, unconscious, out of the bar by others and put into a Government vehicle, which was going to be driven by Clifford who also had been drinking, even though Blevins obviously thought that something was amiss because he later reported the incident to First Sergeant Adkins.

The Government owed Petitioner an affirmative duty to ensure her safety in the presence of its recruiter. Because Petitioner was a potential recruit, the assault itself is not the only relationship she had with the government, thus, an affirmative duty existed on the part of the Government to protect her, and Respondent breached this duty. Further, because Petitioner was a minor, there was a special relationship created the moment Sergeant Clifford took Petitioner into his care and custody, and Respondent had a duty to protect Petitioner since she had been deprived of the protection of her mother, and Respondent breached this duty.

Had Petitioner not become inebriated to the point of unconsciousness, she could have refused to leave the bar with Sergeant Clifford; refused to go into the motel room with Sergeant Clifford; refused to undress and shower with Sergeant Clifford; and refused to have sex with Sergeant Clifford. As a direct result of the negligence of Respondent's employees other than Clifford, Petitioner was raped, injured and has sustained damages.

CONCLUSION

This case presents a unique opportunity for this Court to decide for itself whether the peculiar facts of this case where Respondent assumed the responsibility for a 17 year old underage female potential Army recruit, fall within the exception which this Court has set forth in *Sheridan*.

It is the position of the Petitioner that the duties which Petitioner alleged were owed to her in this case and as were alleged in her complaint, are duties which other government employees owed to her, which were independent of the duties which Clifford owed to her. If this is the case, then Petitioner's claim would not arise out of an assault and battery and would not be barred by 28 U.S.C.A. § 2680(h).

Respectfully Submitted,

Robert A. Taylor
Counsel of Record
181 Summers St.
Charleston, West Virginia 25301
(304) 342-3106

Counsel for Petitioner
Sara Elizabeth Lilly

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-1760

SARA ELIZABETH LILLY,

Plaintiff - Appellant,

versus

UNITED STATES OF AMERICA,

Defendant - Appellee.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Joseph Robert Goodwin, District Judge. (CA-00-1006-2)

Submitted: December 14, 2001
Decided: December 20, 2001
[Entered: December 20, 2001]

Before WIDENER, WILLIAMS, and GREGORY, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Robert A. Taylor, MASTERS & TAYLOR, L.C., Charleston, West Virginia, for Appellant. Robert D. McCallum, Jr., Assistant Attorney General, Charles T. Miller, United States Attorney, Anthony J. Steinmeyer, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Sara Elizabeth Lilly appeals from the district court's order granting the United States' motion to dismiss, under Fed. R. Civ. P. 12(b)(6), her complaint filed under the Federal Tort Claims Act, 28 U.S.C.A. S 1346(b) (West Supp. 2001), 28 U.S.C.A. SS 2671-2680 (West 1994 & Supp. 2001). We have reviewed the parties' briefs, the joint appendix, and the district court's opinion and find no reversible error. Accordingly, we affirm on the reasoning of the district court. Lilly v. United States, No. CA-00-1006-2 (S.D.W. Va. May 11, 2001). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

SARA ELIZABETH LILLY,
Plaintiff,

v. CIVIL ACTION NO. 2:00-1006

THE UNITED STATES OF AMERICA,
Defendant.

OPINION AND ORDER
[Entered: May 11, 2001]

Pending before the court is the Motion to Dismiss for lack of Subject Matter Jurisdiction or, in the Alternative, Failure to State a Claim, filed by the United States of America (United States). For the reasons discussed below, the motion is **GRANTED**.

STATEMENT OF FACTS

Because the court now decides a motion to dismiss filed by the United States, it accepts as true the facts as alleged by the plaintiff. In 1997, the plaintiff, a seventeen year-old girl who had dropped out of high school, contacted the Army recruiting office in Charleston, West Virginia. She spoke with Sergeant Mark Clifford (Clifford), an Army recruiter. Clifford contacted the plaintiff at least twice and arranged for her to take the G.E.D. exam, an exam she was required to pass to enlist in the Army. Clifford also offered to take the plaintiff to the test location.

On December 30, 1997, the plaintiff's mother took her to the St. Albans Library to meet Clifford, so that he could take the plaintiff to the exam center. When the plaintiff and Clifford reached the exam center, it was closed. The two then went to lunch, saw a movie, and, at Clifford's suggestion, went to a bar, where Clifford purchased several alcoholic drinks for the plaintiff. The plaintiff became so intoxicated that she vomited on herself and passed out on the bar. Clifford and some other individuals carried the plaintiff from the establishment and placed her in Clifford's car. While the plaintiff was unconscious, Clifford took her to a motel, where he took a shower with her and had sexual relations with her. In the complaint, the plaintiff alleges that:

> the USA, in allowing Sergeant Mark Clifford to do those things as may be necessary to encourage potential Army recruits to join the United States Army, including encouraging underage persons to join, assumed the responsibility for the welfare and safety of underage potential army recruits, including plaintiff, when it allowed Sergeant Mark Clifford to assist plaintiff, pick her up and take her to take the GED test, all of which actions were in furtherance of plaintiff's desire to join the United States Army and in furtherance of the United States Army and USA attempts and plans to encourage persons to join the United States Army.

Comp., at ¶ 13. The plaintiff further argued that, "in assuming the responsibility for the welfare and safety of underage potential Army recruits," the United States

had a duty to screen and monitor recruiters; to determine whether recruiters were engaging in potentially dangerous conduct with recruits; and to have guidelines in effect which governed "what recruiters could do in regard to dealing with potential Army recruits, including underage recruits, [and] underage female recruits" ad which otherwise placed clear restrictions, limitations and guidelines on what a recruiter could and could not do to aid and encourage a potential recruit to join the Army. *Id.* at ¶ 14. The plaintiff seeks $1,000,000 in damages for a variety of injuries, including medical care and counseling, emotional distress, and loss of enjoyment of life.

STANDARD

A court deciding a motion to dismiss accepts as true the factual allegations presented in the complaint. *Flood v. New Hanover County*, 125 F.3d 249, 251 (4th Cir. 1997). Unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief, the court will not grant a motion to dismiss. *Id.* Therefore, the plaintiff's allegations are accepted as true.

DISCUSSION

Pursuant to the doctrine of sovereign immunity, the United States cannot be sued unless it has consented to be sued. Congress has waived sovereign immunity, thus granting this consent, for some actions against the United States. The Federal Tort Claims Act (FTCA) provides that the United States can be sued "for money damages . . . for personal injury . . . caused

by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). However, Congress has not waived such immunity for claims that necessarily arise from assault and battery. 28 U.S.C. § 2680(h).

Exceptions to the waiver of sovereign immunity by the United States are construed broadly and any ambiguities are resolved against the party seeking recovery from the United States. *Thigpen v. United States*, 800 F.2d 393, 394 (4th Cir. 1986), *overruled on other grounds by Sheridan v. United States*, 487 U.S. 392 (1988) ("Only when Congress has clearly and unequivocally expressed its consent to suits against the United States may courts entertain such actions."). In *Sheridan v. United States*, however, the Supreme Court noted that, "in at least some situations the fact that an injury was directly caused by an assault or battery will not preclude liability against the Government for negligently allowing the assault to occur." *Sheridan*, 487 U.S. at 398.

The United States argues that the plaintiff's injuries arise from an assault and battery committed by Clifford and that the claims are thus barred by 28 U.S.C. § 2680(h). The plaintiff asserts that the claims arise from the government's negligence, not from the assault and battery, and are not barred by § 2680(h). Specifically, the plaintiff asserts claims that the United States 1) negligently hired, trained, and supervised its recruiters, including Sergeant Clifford, and 2) took charge of the plaintiff, creating a special relationship

that placed a duty on the United States to protect the plaintiff from harm. The court **FINDS** that the plaintiff's claims against the United States are barred by § 2680(h). Therefore, the motion to dismiss is **GRANTED**.

1. Plaintiff's Negligent Hiring, Training, and Supervision Claim

The legislative history and the wording of the exclusions in § 2680 make it clear that Congress intended to ensure that the United States would not be held liable for the intentional actions of its employees. The Fourth Circuit's treatment of negligent hiring and supervision claims reflects this reading of § 2680 and its legislative history. Allowing an action to proceed based on the government's negligent hiring or supervision of employees who commit intentional torts would enable plaintiffs to make an end-run around the exclusions embodied in § 2680 and could effectively eclipse the exclusions.

The Fourth Circuit has been clear in its refusal to allow claims to proceed based on a theory that the United States negligently hired or supervised an employee who committed an intentional tort. In *Thigpen v. United States*, 800 F.2d 393 (4th Cir. 1986), *overruled on other grounds by Sheridan v. United States*, 487 U.S. 392 (1988), the Fourth Circuit affirmed the dismissal of an FTCA claim brought on behalf of minors who were sexually molested by a naval hospital employee. *Id.* at 398. The court rejected the plaintiff's argument that the hospital was negligent in its supervision of the attacker, finding that the claim was barred by § 2680(h):

> Section 2680 thus bars FTCA claims that allege the negligence of supervisors but depend on the existence of an assault or battery by a government employee. Many assaults can be attributed easily enough to someone's negligence in permitting the attack to take place. To hold such allegations actionable under the FTCA would undermine Congress' clear intent to limit its waiver of immunity in § 2680(h).

Id. at 395.

In *Sheridan*, decided after the Fourth Circuit's decision in *Thigpen*, the Supreme Court addressed the § 2680(h) exception, but refused to address the plaintiff's claim that the United States had negligently hired and supervised the employee who committed the intentional tort in that case. *Sheridan v. United States*, 487 U.S. 392, 403 n.8 (1988) ("[I]t is not appropriate in this case to consider whether negligent hiring, negligent supervision, or negligent training may ever provide the basis for liability under the FTCA for a foreseeable assault or battery by a Government employee."). The Fourth Circuit has not reconsidered its reading of § 2680(h) in the time since *Sheridan* was decided. Therefore, this court's treatment of the negligent hiring, training, and supervision claims is governed by the Fourth Circuit decisions preceding *Sheridan*.

To the extent the plaintiff argues that the United States negligently hired, trained, and retained Clifford, her claims are barred by § 2680(h).

2. Plaintiff's Claim That the United States Assumed an Affirmative Duty of Care

The plaintiff's claim that the United States assumed and breached an affirmative duty of care toward her presents a more difficult question. In *Sheridan*, the Supreme Court unequivocally found that plaintiffs may proceed against the United States in some cases in which the plaintiff's injuries occur from an assault or battery. Several courts have allowed such cases to proceed when a special relationship existed between the plaintiff and the United States such that the United States had assumed an affirmative duty of care in relation to the plaintiff. In each of those cases, however, the government allegedly had breached its duty to the plaintiff through an act of negligence by a federal employee other than the intentional tortfeasor and such act was independent of the intentional tort. *See, e.g., Sheridan v. United States*, 487 U.S. 392 (1988) (failure of navel corpsmen to report drunken serviceman brandishing gun was negligent); *Bembenista v. United States*, 866 F.2d 493 (D.C. Cir. 1989) (army hospital negligently mismedicated patient, rendering her helpless against sexual molestation by medical technician); *Doe v. United States*, 838 F.2d 220 (7th Cir. 1988) (government day care workers negligently left children unsupervised at Air Force base day care center, enabling children to be molested by unknown assailant); *Loritts v. United States*, 489 F. Supp. 1030 (D. Mass. 1980) (after volunteering to provide escorts to members of visiting choral group, West Point failed to provide escort to plaintiff, who was member of group and who was raped while walking unescorted around campus).

In her Memorandum in Opposition to Defendant's Motion to Dismiss, the plaintiff claims that the government would be liable if Clifford had taken the plaintiff to the exam location, then had driven her to a remote and dangerous area and left her there, where she was raped or killed. Therefore, the plaintiff argues, it would be anomalous to find that the United States is shielded from liability because Clifford was the assailant. Pl's. Mem. at 12. This court disagrees. The distinction between the two situations is illustrated, in part, by the plaintiff's own argument: She argues that her cause of action against the United States "arose from a duty that existed before the commission of the tort." *Id.*. Perhaps the United States owed the plaintiff a duty that existed prior to the intentional tort; however, the only alleged *breach* of that duty occurred when Clifford committed the intentional tort.

Sergeant Clifford met the plaintiff at the library to take her to the exam; Sergeant Clifford took her to lunch, the movies, and the bar; Sergeant Clifford bought her drinks until she passed out; Sergeant Clifford then took the plaintiff to a motel, where he raped her. It is impossible to separate Clifford's intentional acts from any negligent acts of the United States. The United States can only be held liable for the acts of its employees. *See* 28 U.S.C. § 1346(b). Therefore, the plaintiff cannot allege that the United States breached a duty to her unless she can show that a specific United States employee, other than the intentional tortfeasor, negligently breached a duty to her. This case, which involves only one government actor, is distinguishable from *Sheridan*, *Doe*, and the other cases in which plaintiffs have avoided dismissals because of § 2680(h). Even if the United States did

assume an affirmative duty of care toward the plaintiff, the plaintiff cannot show that the United States breached that duty independent of Sergeant Clifford's intentional acts, and the United States is not liable for the intentional torts of its employees.

CONCLUSION

The Supreme Court has not resolved the issue of whether § 2680(h) bars claims that the United States negligently hired, trained, and supervised employees who later committed assault and battery. Therefore, this court's decision is constrained by the Fourth Circuit caselaw on the issue. Because the Fourth circuit has found that such claims are barred by § 2680(h), the plaintiff cannot proceed on her claims that the United States negligently hired, trained, and supervised Clifford.

The Supreme Court has found that some claims by plaintiffs who were assaulted by a governmental employee are not barred by § 2680(h). However, each of those cases involved negligence by the government that was independent of the intentional assault or battery. To the extent the United States assumed an affirmative duty of care toward the plaintiff in this case, the only alleged breach of that duty is the intentional conduct of Clifford.

Congress specifically excluded intentional torts from the government's waiver of sovereign immunity. Because the plaintiff does not present claims for government negligence that occurred independent of Clifford's actions, the plaintiffs' claims are barred by § 2680(h).

Consequently, the plaintiff has not alleged a claim for which relief can be granted. Accordingly, the defendant's motion to dismiss is **GRANTED**.

The court **DIRECTS** the Clerk to 1) send a copy of this Order to counsel of record and any unrepresented party and 2) publish this opinion at www.wvsd.uscourts.gov.

ENTER: May 11, 2001

JOSEPH R. GOODWIN
UNITED STATES DISTRICT JUDGE

Robert A. Taylor
Masters and Taylor, L.C.
181 Summers Street
Charleston, WV 25301
For Plaintiff Sarah Elizabeth Lilly

Stephen M. Horn
Kelly R. Curry
United States Attorney's Office
300 Virginia Street, East
Charleston, WV 25301
For Defendant United States of America

2:00cv1006 Lilly V. United States

10/27/00	1	COMPLAINT; Filing Fee $150.00; Receipt #7488. (skh) [Entry date 10/31/00]
10/27/00		SUMMONSES issued, original plus 7 copies, for United States; Returnable days: 60. (skh) [Entry date 10/31/00]
10/27/00	2	CERTIFICATE OF SERVICE by Sara Elizabeth Lilly for first set of interrogatories and first request for production of documents to deft. (skh) [Entry date 10/31/00]
10/27/00	--	CASE assigned to Judge Joseph R. Goodwin (ras) [Entry date 11/01/00]
11/2/00	3	SUMMONS Returned Executed by personal service as to United States of America upon DeeAnne Wriston, on behalf of the U.S. Atty., on 10/31/2000; Answer due on 1/1/2001 for United States of America. (mkw)
11/13/00	4	SUMMONS Executed by cert. mail as to U.S. Dept. of Army, U.S. Claim Service, on behalf of the United States on 11/2/2000, w/cert. mail return receipt card executed by an agent of same

		attached. (answer deadline previously set for 1/1/2001) (skh)
11/17/00	5	SUMMONS Executed by cert. mail as to United States Attorney General's office, on behalf of the United States on 11/03/2000, w/cert. mail return receipt card executed by an agent of the same attached. (answer dealine previously set for 1/1/2001) (mkw) [Edit date 11/17/00]
12/12/00	6	MOTION by United States to Dismiss for lack of subject matter jurisdiction or, in the alternative, to Dismiss for failure to state a claim. (skh) [Entry date 12/15/00]
12/12/00	7	MEMORANDUM OF LAW by United States in support of [6-1] motion to Dismiss for lack of subject matter jurisdiction or, in the alternative, [6-2] motion to Dismiss for failure to state a claim. (skh) [Entry date 12/15/00]
12/12/00	8	ANSWER to Complaint by United States of America. (Attorney Kelly R. Curry) (skh) [Entry date 12/15/00]
12/15/00	9	ORDER AND NOTICE: Rule 12(b) motions w/supporting briefs 1/16/2001; Initial Management Conference 1/23/2001 1:30; Last day for Rule 26(f) meeting 2/9/2001; Last day to file Rule 26(f) meeting report 2/16/2001;

		Scheduling/status Conference with the Court 1:30 3/2/2001; Entry of Scheduling Order due by 3/12/2001; Last day to make Rule 26 (a) (1) disclosures 3/16/2001. (signed by Judge Joseph R. Goodwin) (cc:attys; unrepresented parties) (pdb) [Entry date 12/18/00]
12/22/00	10	STIPULATION ORDER: upon agreement of the parties, Plt'f's Response due by 1/15/2001 for govt's [6-1] motion to Dismiss for lack of subject matter jurisdiction or, in the alternative, [6-2] motion to Dismiss for failure to state a claim; Deft's Reply to Pltf's Response to said Motion due by 2/1/2001; directing that the same be the finding of his court and that the parties have until such times to file their responsive brief. (signed by Judge Joseph R. Goodwin) (cc: attys) (pdb)
12/22/00	11	MOTION by United States to Stay [9-1] Order and Notice until the court decides the deft's [6-1] and [6-2] motion to dismiss. (pdb)
12/27/00	12	ORDER granting deft's [11-1] motion to Stay [9-1] Order and Notice until the court decides the deft's [6-1] and [6-2] motion to dismiss; all proceedings are stayed pending the resolution of the Motion to Dismiss previously filed

		by the deft. (signed by Judge Joseph R. Goodwin) (cc: attys, and any unrepresented party) (mkw) [Edit date 12/28/00]
1/16/01	13	NOTICE and MOTION by Sara Elizabeth Lilly to Stay and/or Extend all deadlines and to Extend Time and otherwise Stay pltf having to respond to the United States' motion todismiss. (skh)
1/16/01	14	ORDER staying all proceedings in this matter pending further notice; extending the time for pltf to respond to deft's [6-1] motion to Dismiss for lack of subject matter jurisdiction and [6-2] motion to Dismiss for failure to state a claim until 5/1/01. (signed by Judge Joseph R. Goodwin) (cc: attys; any unrepresented party) (skh)
1/17/01	15	RESPONSE by United States of America to pltf's [13-1] motion to Stay. (mkw)
3/28/01	16	MEMORANDUM by Sara Elizabeth Lilly in opposition to deft's [6-1] motion to Dismiss for lack of subject matter jurisdiction and [6-2] motion to Dismiss for failure to state a claim, with affidavits of Sara Elizabeth Lilly, Pamela Lilly, and Randy West attached. (pdb) [Edit date 03/28/01]

4/4/01	17	REPLY BRIEF by United States to *pltf's [16-1] memorandum in* opposition to deft's [6-1] motion to Dismiss for lack of subject matter jurisdiction and [6-2] motion to Dismiss for failure to state a claim. (skh) [Entry date /4/05/01]
5/11/01	18	OPINION AND ORDER granting deft's [6-1) motion to Dismiss for lack of subject matter jurisdiction; granting deft's [6-2) motion to Dismiss for failure to state a claim, finding the pltf's claims against the United States are barred by 28 U.S.C. 2680 (h) and that pltf has not alleged a claim for which relief can be granted. (signed by Judge Joseph R. Goodwin) (cc: attys; any unrepresented party) (published on the court's website at www.wvsd.uscourts.gov) (skh)
5/11/01	19	JUDGMENT ORDER in accordance with the accompanying opinion and order, entering judgment in favor of the deft; dismissing and striking this case form the docket of this court. (signed by Judge Joseph R. Goodwin) (cc: attys; any unrepresented parties) (skh)
5/11/01	--	Case closed. (skh)

5/29/01	20	NOTICE OF APPEAL by Sara Elizabeth Lilly of the [18-1) opinion and order and [19-1) judgment order entered 5/11/01. (skh)
5/30/01	21	Notice of Appellate Action with certified copy of docket, opinion and order, judgment order and notice of appeal to 4CCA: [20-1] appeal by Sara Elizabeth Lilly. (cc: attys) (skh) [Edit date 06/04/01]
5/30/01	--	Appeals packet mailed to pltf/appellant's counsel, Robert A. Taylor. (skh)
5/31/01	--	Filing Fee Paid for pltf's [20-1] notice of appeal; FILING FEE $105.00; RECEIPT #8711. (skh)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

SARA ELIZABETH LILLY
Plaintiff,

v. Civil Action No. 2:00-1006

THE UNITED STATES OF AMERICA,
Defendant.

COMPLAINT

Comes now plaintiff, Sara Elizabeth Lilly, for her complaint against the defendant, The United States of America, and alleges and avers as follows:

1. Sara Elizabeth Lilly is a resident of Kanawha County, West Virginia.

2. Jurisdiction is asserted against the United States of America [USA] pursuant to 28 U.S.C. 1346, more commonly known as the Federal Tort Claim Act.

3. Plaintiff has complied with the provisions of 28 U.S.C. 2675 and has provided proper notice of the claim to the United States Department of the Army, as will more fully appear from the Notice and Response appended hereto and incorporated herein by reference as Exhibit A.

4. The plaintiff, Sara Elizabeth Lilly, filed her Federal Torts Claim with the appropriate Government Agency within two years from the date she knew or should have known that the negligent acts, as hereafter alleged, had been committed against her, and further, more than six months have elapsed since the filing of the claim without the United States Department of the Army taking any action on the claim, and because of the Army's failure to respond in the time provided by law,

your plaintiff can now file her lawsuit with the United States Federal District Court.

5. Plaintiff's claim against the defendant, USA, arises out of actions directed toward her by a United States Army Recruiter, Sergeant Mark Clifford, who was, at all times mentioned herein, located and stationed at the United States Army Recruiting office located in South Charleston, West Virginia, at River Walk Mall, and all of his actions as hereafter alleged took place in Kanawha County, West Virginia.

6. That at the time Sergeant Mark Clifford engaged in the conduct complained of as hereafter alleged, plaintiff was seventeen years of age.

7. That prior to December 30, 1997, your plaintiff had dropped out of high school and realized she needed to get an education and decided one of the best ways to do so was by joining the Army so she could get her GED and a college degree. Further, plaintiff contacted the Army Recruiting Office in South Charleston, West Virginia, and spoke with Sergeant Mark Clifford at this office on several occasion during the month before December 30, 1997.

8. That when plaintiff dealt with Sergeant Mark Clifford, she advised him she was 17 years of age, and she was a high school drop out, and the reason she wanted to join the Army.

9. That Sergeant Mark Clifford came to plaintiff's mother's home to administer a test to plaintiff and to also make arrangements for plaintiff to take a GED test on December 30, 1997. Clifford did thereafter pick plaintiff up and take her to Garnet Education Center where plaintiff was told the test would be given. However, when plaintiff arrived at Garnet Education Center, she learned that Garnet was closed. Sergeant

Mark Clifford thereafter took plaintiff to lunch, a movie, and the Kanawha Mall. Following the movie, Sergeant Clifford took plaintiff to a restaurant known as Griff's in South Charleston, West Virginia, which is in the same shopping mall where the Army Recruiter office is located at which Sergeant Mark Clifford worked.

10. That Sergeant Mark Clifford, while at Griff's, purchased numerous alcoholic drinks for plaintiff, which she consumed and caused her to get drunk, vomit on herself, and pass out.

11. That while plaintiff was passed out and otherwise incapacitated by her alcoholic intoxication, Sergeant Mark Clifford, had sex with her.

12. That all actions taken by the Sergeant Mark Clifford toward plaintiff as herein before described were taken under the guise of, in his capacity as, and under the apparent authority in his role as a United States Army Recruiter, for USA.

13. That the USA, in allowing Sergeant Mark Clifford to do those things as may be necessary to encourage potential Army recruits to join the Untied States Army, including encouraging underage persons to join, assumed the responsibility for the welfare and safety of underage potential Army recruits, including plaintiff, when it allowed Sergeant Mark Clifford to assist plaintiff, pick her up and take her to take the GED test, all of which actions were in furtherance of plaintiff's desire to join the United States Army and in furtherance of the United States Army and USA attempts and plans to encourage persons to join the United States Army.

14. That USA and the United States Army in assuming the responsibility for the welfare and safety of underage potential Army recruits as aforesaid,

including plaintiff, had a duty to, including a duty as to Sergeant Mark Clifford to:

a. Screen persons who would have this responsibility, including Sergeant Mark Clifford, before they were ever allowed to assume this responsibly to make certain such person do not, by their actions or inactions, place potential recruit's health and safety at risk;

b. Continue to monitor such persons who had this responsibility and make certain they were carrying out these duties, including Sergeant Mark Clifford;

c. To determine if such persons were engaging in conduct which could jeopardize a potential recruit's health, welfare and safety, including plaintiff;

d. To have guidelines in effect concerning what recruiters could do in regard to dealing with potential Army recruits, including underage recruits, underage female recruits and which otherwise placed clear restrictions, limitations and guidelines on what an Army Recruiter can and cannot do to aid and encourage a potential recruit to join the United States Army;

e. Continue to monitor such persons to see that they are following and complying with the aforesaid guidelines and taking appropriate action against those persons if they do not comply with these guidelines; and

f. To determine if such persons were otherwise committing other negligent, careless and unlawful acts which may jeopardize the health, welfare and safe of potential underage female recruits.

15. That USA negligent, careless and unlawfully breached its duties as aforesaid, that it owed to the plaintiff and as a direct and proximate result of the negligence of the defendant as aforesaid, plaintiff has suffered the following injuries and damages:

a. She was subject to an unauthorized touching of her body;

b. Required her to seek medical care and counseling, and it may require her to seek the same in the future;

c. Caused her to suffer and she will continue to suffer in the future great emotional, mental pain and distress, embarrassment, loss of self esteem and self confidence and damage to her psyche;

d. It negatively effected her ability to interact with and get along with family and friends and caused her to move away from them ;

e. It has caused her to suffer and she will continue to suffer in the future a loss of enjoyment of life;

f. She has suffered financial losses in the form of costs related to medical care and counseling and it is unknown at this time if she may need to incur future medical care and expenses for the treatment of the aforesaid injuries; and

g. She has otherwise been injured and damaged in ways and in an amount to be determined by the Court.

WHEREFORE, the plaintiff, Sara Elizabeth Lilly, requests an advisory trial by jury, and judgment of and from the defendant, USA, in the sum of $1,000,000.00, together with interest and costs as allowable by law.

SARA ELIZABETH LILLY,
By Counsel

/S/ Robert A. Taylor
Robert A. Taylor (WV Bar No. 3710)
Paula L. Wilson (WV Bar No. 6101)
Masters & Taylor, L.C.
181 Summers Street
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON

SARA ELIZABETH LILLY,

Plaintiff,

v. Civil Action No. 2:00-1006

UNITED STATES OF AMERICA,

Defendant.

UNITED STATES MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION OR, IN THE ALTERNATIVE, FAILURE TO STATE A CLAIM

Comes now the United States of America ("United States") pursuant to Rule 12 (b) (1) and 12 (b) (6) of the Federal Rules of Civil Procedure and does hereby move the court to enter an order dismissing this action for lack of subject matter jurisdiction or, in the alternative, for failure to state a claim on which relief can be granted.

In support of its motion, the United States says:

1. Accepting the plaintiff's allegations as true, the United States has not waived its sovereign immunity for an assault and battery committed by a federal employee acting within the scope of his or her employment. 28 U.S.C. § 2680 (h).

2. Alternatively, accepting the plaintiff's allegations as true, plaintiff's complaint fails to state a claim upon which relief can be granted.

In further support of its motion, the United States attaches hereto and incorporates herein by reference its Memorandum of Law.

WHEREFORE, the United States prays this court enter an order dismissing plaintiff's complaint on the grounds set forth herein.

Respectfully submitted,

REBECCA A. BETTS
United States Attorney

By: /S/ Stephen M. Horn
STEPHEN M. HORN
Assistant United States Attorney

/S/ Kelly R. Curry
KELLY CURRY
Assistant United States Attorney
300 Virginia Street, East
Charleston, West Virginia 25301
(304) 345-2200

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

SARA ELIZABETH LILLY,
Plaintiff,

v. Civil Action No. 2:00-1006
Honorable Joseph Robert Goodwin

THE UNITED STATES OF AMERICA,
Defendant.

AFFIDAVIT OF SARA ELIZABETH LILLY

Sara Elizabeth Lilly, after being duly sworn, deposes and says as follows.

1. That I am the plaintiff in the above styled lawsuit.

2. That prior to December 30, 1997, I had dropped out of high school. I realized that I needed to get an education and decided one of the best ways for me to do this was by joining the Army to get my GED and a college degree. In this regard, I contacted the United States Army Recruiting Office located in South Charleston, West Virginia, at River Walk Mall and spoke with Sergeant Mark Clifford at this office on several occasion during the month before December 30, 1997.

3. That when I dealt with Sergeant Mark Clifford, I advised him I was 17 years of age, was a high school drop out, and the reason I wanted to join the Army. Further, throughout the entire time I dealt with Sgt. Clifford, I was 17 years of age.

4. That before December 30, 1997, Sergeant Mark Clifford came to my home where I lived with my mother, Pamela Lilly, to administer a test and to also make arrangements for me to take the GED test on December 30, 1997.

5. That on December 30, 1997, Sgt. Clifford drove a United States Government vehicle to pick me up and take me to the Garnet Career Center where he told me the test would be given. Further, throughout the remainder of the time I was with Sgt. Clifford on this day he drove this same government vehicle and to my knowledge and belief he continued to use this same vehicle while I was with him on December 31, 1997.

6. That when Sgt. Clifford picked me up to take me to the Garnet Career Center he was wearing clothing which had "ARMY" written on it.

7. That when Sgt. Clifford drove me to the Garnet Career Center, I learned that the Garnet Career Center was closed. Sergeant Mark Clifford thereafter took me to lunch, a movie, and the Kanawha Mall, and following the movie, Sergeant Clifford took me to a restaurant known as Griff's in South Charleston, West Virginia, which is in the same shopping mall where the United States Army Recruiting office is located where Sergeant Mark Clifford worked.

8. That when we arrived at Griff's, there were several other persons present and were dressed in Army uniforms who apparently knew Sergeant Clifford and I believe may have even worked in the same recruiting office with him. Further, while we were at Griff's, to my knowledge, information, and belief, most, if not all of these persons remained there.

9. That while we were at Griff's, Sgt. Clifford purchased numerous alcoholic drinks for himself and for me, which drinks I consumed, and caused me to get drunk, vomit on myself, and pass out.

10. That to my knowledge, information, and belief, after I passed out, Sgt. Clifford took me to the United States vehicle he was driving and drove to a motel, while I was passed out and otherwise incapacitated by my alcoholic intoxication, and where he had sex with me.

11. That I believe the United States of America and the Untied States Army, by allowing Sergeant Mark Clifford to do those things as may be necessary to encourage underage potential Army recruits [those under 18 years of age] to join the Untied States Army, including encouraging me to join the Army, assumed the responsibility for our care, welfare, safety, and protection throughout the entire time we were with any government or Army personnel, including the time I was with Sgt. Clifford, from the time he picked me up on December 30, 1997.

Further, your Affiant saieth not.

Dated this 15 day of January, 2001.

/S/Sara Elizabeth Lilly

SARA ELIZABETH LILLY

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, To-Wit:

This day personally appeared SARA ELIZABETH LILLY, who after being first duly sworn according to law, says that she is the person named in the foregoing "AFFIDAVIT" and that the facts and allegations are true, except insofar as they are therein stated to be upon information, and insofar as they are therein stated to be upon information, she believes them to be true.

/S/Sara Elizabeth Lilly
SARA ELIZABETH LILLY

Taken, subscribed, and sworn to before me this 15 day of January, 2001.

- My commission expires: September 16, 2008

[SEAL]

/S/ Tiffany L. Slack
NOTARY PUBLIC

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

SARA ELIZABETH LILLY,
Plaintiff,

v. Civil Action No. 2:00-1006
Honorable Joseph Robert Goodwin

THE UNITED STATES OF AMERICA,
Defendant.

AFFIDAVIT OF PAMELA LILLY

Pamela Lilly, after being duly sworn, deposes and says as follows:

1. I am the mother of Sara Elizabeth Lilly, plaintiff in the above styled case.

2. That before December 30, 1997, Sara, had dropped out of high school and realized she needed to get an education. She decided the best way for her to do this was by joining the Army. In this regard, before December 30, 1997, she had contacted The United States Army Recruiting Office in South Charleston, West Virginia, located at River Walk, and spoke with a person at this office on several occasion about joining the Army.

3. That at all times my daughter, Sara, dealt with the United States Army Recruiter, she was 17 years of age.

4. That before December 31, 1997, Sergeant Mark Clifford had come to my home where Sara lived with me to administer a test to her. Further, he also

made arrangements for Sara to take her GED test at the Garnet Career Center on December 30, 1997. He also made arrangements to pick Sara up and take her to the Garnet Center to take the test.

5. That on December 30, 1997, Sgt. Clifford picked Sara up and took her to the Garnet Career Center. Further, when Sgt. Clifford picked Sara up, he was driving a vehicle that had been issued to him by the United States Government.

6. That the United States of America, by allowing Sergeant Mark Clifford to do those things as may be necessary to encourage and assist my daughter, Sara, who was under the age of 18, to join the Untied States Army, and in particular by allowing Sgt. Clifford to pick Sara up and take her to the Garnet Career Center to take her GED, the United States of America and Sgt. Clifford assumed the responsibility for Sara's welfare and safety while she was in Sgt. Clifford's care and custody, since she was under the age of 18 when he did this.

Further, your Affiant saieth not.

Dated this 15 day of January, 2001.

/S/ Pamela Lilly
PAMELA LILLY

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, To-Wit:

This day personally appeared PAMELA LILLY, who after being first duly sworn according to law, says that she is the person named in the foregoing "AFFIDAVIT" and that the facts and allegations are true, except insofar as they are therein stated to be upon information, and insofar as they are therein stated to be upon information she believes them to be true.

/S/ Pamela Lilly
PAMELA LILLY

Taken, subscribed, and sworn to before me this 15 day of January, 2001.

My commission expires: September 16, 2008

[SEAL]

/S/ Tiffany L. Slack
NOTARY PUBLIC

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

SARA ELIZABETH LILLY
Plaintiff,

v. Civil Action No. 2:00106
Honorable Joseph Robert Goodwin

THE UNITED STATES OF AMERICA,
Defendant.

AFFIDAVIT OF RANDY WEST

RANDY WEST, after being duly sworn, deposes and says as follows:

1. I am a retired deputy from the Kanawha County Sheriff's Department, and when I was last employed by the Sheriff's Department, I was a Detachment Commander and Shift Supervisor.

2. That during the course of my employment with the Sheriff's Department, I was assigned to investigate an alleged sexual assault of a female, Sara Elizabeth Lilly, by SFC. Mark Clifford, a United States Army Recruiter, which occurred in Kanawha County in late December, 1997. That during the course of my investigation, I took numerous statements and completed a report concerning this alleged assault, which resulted in the indictment of SFC. Mark Clifford by the Kanawha County Prosecuting Attorney's office for sexual assault of Sara Elizabeth Lilly.

3. That attached hereto as Exhibit A, are true and accurate copies of portions of the official Kanawha County Sheriff's Department Investigative Report done by me regarding the alleged sexual assault of Sara Elizabeth Lilly by SFC. Mark Clifford, including statements taken by me of prospective witnesses who may have had some knowledge concerning events leading up to, or after the alleged assault of Sara Elizabeth Lilly, which are a part of the official records and investigative file of the Kanawha County Sheriff's Department regarding this alleged assault, which would have been supplied to the Kanawha County Prosecuting Attorney's office to aid its attorneys in the prosecution of SFC. Mark Clifford.

Further, your Affiant saith not.

Dated this 19 day of January, 2001.

/S/ Randy West
RANDY WEST

STATE OF WEST VIRGINIA,
COUNTY OF Kanawha, To-Wit:

This day personally appeared RANDY WEST, who after being first duly sworn according to law, says that he is the person named in the foregoing "AFFIDAVIT" and that the facts and allegations are true, except insofar as they are therein stated to be upon information, and insofar as they are therein stated to be upon information he believe them to be true.

/S/ Randy West
RANDY WEST

Taken, subscribed, and sworn to before me this 19 day of January, 2001.

My commission expires: September 16, 2008

[SEAL]

/S/ Tiffany L. Slack
NOTARY PUBLIC

Kanawha County Sheriff's Department
Law Enforcement Division

Report of Investigation

Headquarters File Number:	CI-8391
Date of Report:	March 3, 1998
Complaint Received by:	Cpl. D.A. Brick
Investigation Assigned by:	Lt. J. W. Johnson *(Initialed)*
Report Made by:	Cpl. R.L. West
Status of Investigation:	Complete
Initial or Supplement:	Initial
Subject of Investigation:	Second Degree Sexual Assault In Violation of: Chapter 61, Article 8b, Section 4 of the W. Va. State Code

ACCUSED:

Clifford, Mark Allen, 35 YOA
White American Male
Address: 2380 Savory Drive
Charleston, West Virginia 25312
Telephone Number: (304) 744-0548
Date of Birth: 03/23/62
Social Security Number: 150-68-2125
Criminal History: No criminal record.

SUSPECTS:

None other than the accused.

DATE OF CRIME:

Tuesday, December 30, 1997, in the evening hours.

PLACE OF CRIME:

Kanawha County. 48 States Motel, Room #3, 6206 MacCorkle Avenue, St Albans, West Virginia 25177.

DISCOVERED BY:

The victim, Sara E. Lilly.

WEATHER CONDITION:

N/A

VICTIM :

Lilly, Sara E., 17 YOA
White American Female
Address: Rte. 4 Box 227
St. Albans, West Virginia 25177
Telephone Number: (304) 727-3419
Criminal History: No criminal record.

MOTIVE:

Sexual gratification.

MODE OF OPERATION:

The accused took the victim to Griff's Pub located in Riverwalk Mall in South Charleston and supplied her with various forms of alcoholic beverages. When she became extremely intoxicated he transported her to the place of the crime. He undressed her and took a shower with her. He then took her to bed and engaged in sexual intercourse with her.

PROPERTY STOLEN:

N/A.

PROPERTY RECOVERED:

N/A.

LIST OF EXHIBITS:

1) Sexual assault kit from Women's & Children's Hospital
2) Victim's clothing
3) Clothing provided to victim by the accused after the assault
4) Registration card from 48 States Motel in the accuser's name an driver's License number

ACTION TAKEN:

On Wednesday, December 31, 1 997 at approximately 1346 hours, Corporal D.A. Brick was dispatched to Women & Children's Hospital to respond in reference to a sexual assault complaint. He arrived at approximately 1410 hours, and met with the victim, Sara E. Lilly, age 17. She indicated to Corporal Brick that approximately two weeks ago, she met an Army Sergeant, Sergeant First Class, Mark Clifford, and that she was anticipating enlisting in the United States Army. She stated that on Tuesday, December 30, her mother took her to the St. Albans library, where she met with Sergeant Clifford and he was to take her for her GED, she advised Corporal Brick that he took her to a location in the Charleston area and determined that this location was closed and was not giving the GED's on this day and that he subsequently took her to lunch at an Oriental restaurant in the Cross Lanes area. She stated that Sergeant Clifford then suggested that they go see a movie, and they went to the Kanawha Cinemas and saw Scream 2. She stated that she had been upset about a friend of hers having to move out of her house, and that Sergeant Clifford knew this and that Sergeant Clifford told her she looked like she needed a drink and he took her to Griff's, which is a restaurant pub in the Riverwalk Plaza in South Charleston. Where he bought her a screwdriver, another screwdriver, which is a mixed drink, a shot of whiskey and various other drinks. She stated that she became extremely intoxicated, became ill and threw up. She stated that Sergeant Clifford then took her to the 48 States Motel In St. Albans. She barely remembers what happened. She remembers bits and

pieces. She took a shower, Sergeant Clifford gave her the shower, and washed her off and then took her to bed. She states they had sexual relations but she refused to go into detail with Corporal Brick. She stated that the following morning at approximately between 0630 and 0730, she remembers taking another shower, that Sergeant Clifford took her to her residence, but that they discovered that her mother's car was there and that he then took her to a friend's house and in Corporal Brick's report, she is identified only as Angie, and that Sergeant Clifford recommended, and suggested that she tell her mother that she spent the night at Angie's. Corporal Brick obtained a sexual assault investigation kit at the hospital and submitted it to the evidence section of the Kanawha County Sheriff's Department, Headquarters.

On January 2, 1998 at 0840 hours, I received the sexual assault examination kit from the lockers placed it in the evidence room, and attempted to call the Army Commander for the local area to advise them there was a criminal investigation going on with military personnel, unable to locate anyone.

On January 5, 1998, I called the victim's mother Pamela Lilly at home and advised her that we were initiating an investigation, and that I had been assigned to the case. I made arrangements with Mrs. Lilly to bring her daughter in at 0900 hours, on January 6, 1998.

On this same date, January 5, I received a phone call from Captain Beth Botti, Company Commander of the St. Albans Army Reserve Recruiting area. She stated that she had received information that one of her recruiters, Sergeant Mark Clifford was the subject of investigation. She advised that he was a 32 year old, white male, holds the rank of E-7 Sergeant First Class in

the Army. She stated that he is a special forces soldier, married, and a bit quirky. She stated that she was told by two other Army recruiters that they saw him drinking with the female in Griff's on the evening of the crime, and she stated that he was missing for some time. When I asked Captain Botti what she meant by missing, she stated that on that evening of the crime, the victim's mother started calling the Army wanting to know where her daughter was, and the recruiter's wife started calling the Army advising she wanted to know where her husband was. She stated that the First Sergeant in charge of the recruiters subsequently brought Sergeant First Class Clifford in and talked with him, and he indicated that he took the girl to a friend' house and that he had spent the night at a friend's house by the name of Mark March. At that time however, the First Sergeant was unaware of the sexual assault allegations. Captain Botti has agreed to give copies of statements from the Sergeants that she took, and agreed to allow me to interview the First Sergeant upon his return back to the West Virginia area. He is currently on assignment in Kentucky, temporarily.

On the morning of Tuesday, January 6, 1998 at approximately 0820 hours, Captain Botti called me back at Headquarters indicated that she had talked to the JAG, Military affairs office, indicated that she was instructed to cooperate 100% with the local police in this matter, and that she was standing by to assist us in any way. I requested at that time copies of the statements and agreed to pick them up at a later time on this date.

At approximately 0900 hours on January 6, the victim and her mother, Pam Lilly came to the office. After talking with them briefly, I separated the two. I

obtained a statement from Sara Lilly. She indicated that she has known the Recruiting Sergeant for approximately 2- 2 ½ weeks. She said that she called the recruiting office to initially enlist in the United States Army Reserve and asked for a female recruiter that a friend of hers had used, and was told that she was out of town, but Sergeant Clifford, the person she was speaking to, volunteered to come down and talk with her. She indicated that Sergeant Clifford arrived and convinced her to join the regular Army. She states that on the afternoon of the crime, at approximately 1300 hours, she met him at the St. Albans library, and as stated earlier in this portion of the report went to the Garnet School to get her GED test, and determined they were closed, then went to lunch, and went to the movie, Scream 2, in Kanawha City, and then went to Griff's, where he purchased several drinks. She became intoxicated. She stated she remembers two other Army Recruiting Sergeants being present at Griff's and talking with Sergeant Clifford and then leaving. She stated that she got intoxicated and threw up in the restaurant. He took her to the white Jeep Cherokee Army vehicle. She threw up again in that vehicle, and he subsequently took her to the 48 States Motel, where he had sexual relations with her. She stated that the sexual relations included him placing his fingers in her vagina, and getting on top of her, in the missionary position and having intercourse with her for what she described as a lengthy period of time. She states that she awoke the next morning, took another shower and he took her to her mother's house. Upon arrival, they discovered the mother's car there. He took her then to her friend Angie Vanatter's house and told her to tell her mother that she spent the night

there. She further states that she advised Angie Vanatter, and her boyfriend Casey Jones what had happened the night before. After taking a statement from her, I took two photographs of her for the purpose of identification at Griff's and then took a statement from her mother, Pamela Lilly.

Pam Lilly states that she also remembers taking her daughter to the St. Albans library on the day of the crime. She became concerned that evening when she did not come home and called Sergeant Clifford the following morning. Sergeant Clifford told her that she had met with her friend Angie at the movies in Kanawha City, and had went home and spent the night with her. She states that a few days after this incident, Sergeant Clifford called her and she confronted him about sexually assaulting her daughter and he denied the allegations. As Lilly was advised to go to Women & Children's Hospital, and Dr. Hayes' office in South Charleston, where they advised that they took her to initially, and get copies of the medical records to turn over to me. Also during this interview the victim brought me the clothes that she was wearing at the time of the assault. The clothes were placed in evidence and will be transferred at a later date to the C.I.B. lab.

At approximately 1100 hours on this same date, I went to the U. S. Army's Company Commander's office, at 142 MacCorkle Avenue, St. Albans, second floor. Spoke with Captain Beth Botti. She provided me with copies of written statements from two of the Army sergeants that saw Sergeant Clifford in Griff's lounge with an unidentified female the night of the crime. She also indicated that she would set up interviews with me for statements to be obtained from the Sergeant at a later date. She stated that Sergeant

Clifford had been in the military for several years, approximately 13, and that she has had behavioral problems with him in the past and she described him again as being very quirky. She indicated that the Army wanted to cooperate fully in the investigation, and that if I would call her, she would make the arrangements for interviews with any one that we wished to interview, specifically Sergeant Clifford himself. She also advised me that the Military may be eventually launching their own criminal investigation into this matter, but at this time they were not.

Approximately 1315 hours this same date, I went to the 48 States Motel, talked to the clerk, and obtained a copy of the registration card indicating that Mark Clifford checked in the hotel room on the date in question, December 30, 1997, paid $23.00 for a room, and checked in at approximately 11:00PM. Talked to the clerk that checked him in named Faith Schaeffer. She does not recall or remember any details about him. She did indicate however, that the records indicate that he spent the entire night there, leaving sometime the next morning, which would be consistent with the statement given by the victim.

At the instruction of the motel clerk, I went to 5620 MacCorkle Avenue in South Charleston, met with Mike Shaeffer who is the manager of the motel. He was at this address working on a house. He indicated that he recalls the suspect coming to the motel. He can not describe what he looks like, but does remember that they parked out in front of room #3, was a white Jeep Cherokee, as described by the victim. Further advised that he remembers the vehicle was there all night and that they left sometime the next morning. Which is also consistent with the victim's statement.

After leaving the 48 States Motel, I went to Griff's, which is a pub in the Riverwalk Plaza at South Charleston. Upon arrival there, I met the owner's boyfriend, who's name is Kevin Farrell. Kevin was present on the night of the crime at Griff's. He knows the suspect, Sergeant First Class Clifford, and he also remembers him being in there with a younger looking girl. When showed a photograph of the victim, he was able to identify her as being the girl that was in the bar. He stated that what he remembers best, and he showed me the table they were sitting at, which was close to the bar, and says that she apparently became so intoxicated that she laid her head on the table and could not walk. He said that at this time they instructed Mr. Clifford to get the girl out of the bar, and that they had to pick her up and carry her ~~outside,~~ but before leaving the bar she vomited on the table. He stated that she could not stand on her own, and they took her to the outside area, and did not see what vehicle that they got into. He stated that also, they instructed him not to come back into the bar. That they did not appreciate him bringing a young woman in there, and Kevin said that he told Sergeant Clifford that she doesn't even look old enough to drink, and that Sergeant Clifford told him that she was 21 years old. Kevin Farrell agreed to meet me on Wednesday, January 7th, to give a statement at Headquarters regarding what he observed.

Later this date, I met with Aaron Lilly, brother of the victim, at the St. Albans Police Department Detective Bureau. I obtained a statement from him. He states that on Saturday, January 3, 1998 at approximately 1130 hours, the suspect called his residence, where he resides with his mother and the victim, and wanted to know what was going on.

Stated that he hadn't heard from his sister, and Aaron Lilly, the brother, advised the suspect that it was his understanding that he had got his sister drunk and took advantage of her sexually. He stated that Clifford then started cussing saying this was not true. That he had two good friends that could account for where he was that night. The brother did not mention to him what particular night was in question.

Same date, at approximately 2130 hours, I went to Griff's pub in South Charleston, and spoke with Jim Alderson the bartender. Showed him a picture of the victim, he states that he remembers the victim being in the bar that night with the Army recruiter. Due to the fact that he was extremely busy that night we made an appointment to go back at 1400 hours the following day to take a statement from him.

At 10:00 AM on Thursday, January 8, 1998, the suspect, Mark Clifford, came to the Kanawha County Sheriff's Department Headquarters. He was accompanied by Mark March. The suspect was advised of his Constitutional rights, and he signed the rights form and agreed to talk orally with this officer, but he said he would not give a statement at this time on the tape recorder. The allegations were outlined as made in the initial complaint report to the suspect. The suspect denied these allegations. The suspect said that he did in fact meet the victim at approximately 1:00PM on December the 30th, 1997, at the St. Albans library. That he did subsequently take her to Garnet School, but discovered that the school was closed. He stated that he did take her to an Oriental Restaurant for lunch in Cross Lanes, and that he subsequently, at her recommendation and request, took her to Kanawha Cinemas to watch the movie Scream 2. He stated that

while at the Kanawha Cinemas watching the movie Scream 2, she ran in to some friends of hers that he was unable to identify, and stated that she told him she that she would just go home with them. He states that's the last time he saw her. He stated that later that day, he met with Mark March, who is a U S Army potential candidate, and a friend of his, and that they went to Griff's in South Charleston, and stood around for about an hour, had a beer, and then went to Mark's house where they spent the rest of the night. I thanked the suspect for that statement and asked him to step out of the room while I interviewed Mark March, who he had brought as an alibi witness.

I then brought Mark March in to the conference room of the Sheriff's Department Headquarters, and told him what the case was all about. Explained that it was a sexual assault investigation, and that I knew for a fact that he had been at the 48 States Motel on this particular night in question, and had not been at his residence. Mark March immediately stated that he was not going to cover for him. He stated that the suspect told him that he may be in a little of trouble because he had took a 17 year old candidate for the Army, a female, into a bar so that he could have a drink, not her, and that while he was there, she took a pill, and became in an incapacitated state. When Mark March realized that this was a sexual assault investigation, he said the he was not going to offer an alibi for Sergeant Clifford. He stated that Sergeant Mark Clifford of the Army, who he met in a recruiting capacity, had asked him to come to the Sheriff's Department headquarters and essentially lie for him as to an alibi as to where he was that night. Mark March advised that he did not know that this was a sexual assault investigation, and

that he did not see Sergeant Clifford on December the 30th, 1997, but he only talked to him once that day on the phone, and that he didn't see him again until the following day, December the 31st, New Year's Eve. A recorded statement was taken from Mark March, and he requested that he be given a ride home, because he had rode to Headquarters with Sergeant Clifford. Detective Greg Young of the Sheriff's Department transported him back to his residence in Pratt.

The suspect, Mark Clifford, was brought back in the Sheriff's Department Headquarters conference room, and confronted with the story that was given us by Mark March. He was also was confronted with the evidence that two of the Army Sergeants had seen him in Griff's Pub with the female, the victim, and that he had also checked in to the 48 States Motel, at 11:00 PM, on December the 30th, and I showed him a card, the original registration card, and at this time he requested that he speak with an attorney and he declined to answer any further questions. He was arrested, taken before Magistrate Kathy Demarco, arraigned and released on $2500.00 property bond. The bond was posted by Maxwell Crook, a local Charleston bail bondsman.

I advised Mr. Clifford after fingerprinting and photographing him, that I had been on the telephone within the last hour, with Captain Beth Botti, his Company Commander, and as a direct order, he was to report to her immediately, he indicated that he would and as of 1557 hours on this date, he had not reported in or shown up. At this time, I was advised by the U S Army that they were attempting to locate him to place him in confinement.

On Friday, January the 9th, 1998, Sergeant First Class Adkins and Sergeant First Class Blevins came to the Kanawha County Sheriff's Department Headquarters. Sergeant Adkins, full name is Raymond G. Adkins, whose date of birth is 3/27/62, SSN 384-82-2400. Sergeant Blevins, full name is Charles L. Blevins, whose date of birth is 5/2/66, SSN 406-11-6366. Sergeant First Class Adkins is the Station Commander at the South Charleston Recruiting Station, and Sergeant First Class Blevins is a fellow Army Recruiter at that station. Sergeant First Class Adkins said he was at Griff's Pub on the evening of December the 30th, 1997 arriving at approximately 8:00 PM and departing at approximately 8:30 PM. He said that he saw Sergeant Clifford in there with a young female setting at the table. He said that he departed and went home, and that he received a phone call from Sergeant Blevins late that night, indicating that the young female that was with Sergeant Clifford had apparently passed out at the table and had to be carried out of the bar by Sergeant Clifford and employees of the bar. He also stated that Sergeant Blevins called him back at approximately 4:00 AM and that Sergeant Clifford's wife had called him looking for Sergeant Clifford. He states further that at approximately 5:00 AM, Sergeant Clifford's wife called him looking for Sergeant Clifford. He states that when he went to work at approximately 8:15 AM the following morning that Sergeant Clifford's wife was in there and stated that he had not returned home all night and was looking for him. He stated that Sergeant Clifford, upon his arrival, was interviewed by himself, the First Sergeant, and Captain Beth Botti, and he stated that the woman that he was in the bar with, at Griff's drinking, was the wife of a friend of his. They informed

Sergeant Clifford that Pam Lilly, mother of Sara Lilly, had been calling Sergeant Adkins trying to find her daughter. He stated that he took her home the preceding day to a friends house, Angie Vanatter, in the St. Albans area.

Sergeant Blevins states that he was also in the pub at Griff's. Arriving about 8:30 PM with Sergeant Adkins, but he stayed for approximately 2 hours, where as Sergeant Adkins left. He stated that the owner of the pub came to his table and asked him if he knew who the girl was that was with Sergeant Clifford. He stated that he did not know the girl, and he wanted to know why she was asking, and the owner advised him that the young female did not look old enough to be drinking and that the young female had apparently passed out at the table. Sergeant Blevins states that he observed the owner of the bar, the owner's boyfriend, and Sergeant Clifford carrying the girl out of the bar, and she became ill and started vomiting all over the area of the bar. Sergeant Blevins said he followed them out on the parking lot, and he observed Sergeant Clifford place the girl in a white Jeep Cherokee which is the United States Army vehicle assigned to Sergeant Clifford, and attempt to drive away with her. He states that he stopped Sergeant Clifford and asked him if everything was okay, and Sergeant Clifford replied, "yes", and drove off. He states that he called Sergeant Adkins, the Station Commander, and told him what had happened, and that at 4:00 AM. Sergeant Clifford's wife started calling him wanting to know where her husband was. He states that he also called Sergeant Adkins and advised him of this. He states that when he came into work at approximately 8:15 AM, the next morning, Sergeant Clifford's wife was

there, very angry and agitated, and that he started receiving phone calls from Pam Lilly, mother of Sara Lilly, saying that Sergeant Clifford had picked her daughter up at 1:00 PM, the preceding day, to get her GED, and had not brought her back. Sergeant Blevins stated that's when he started putting it together and realized that Sergeant Clifford had been in Griff's Pub with a 17 year old, underage girl drinking. Sergeant Blevins was also ordered by Captain Beth Botti, Company Commander, to supply her with a written statement, and I have a copy of that also. Sergeant Blevins indicated to this officer that he realized the following morning the extent of this problem, and decided that he would cooperate in the Military and Police investigation, if it came to that point.

Also on Friday, January the 9th, I received a phone call from Kenneth Cooper (595-5177). He states that he has a daughter, Kim Cooper, 18 years of age, that approximately two months ago was thinking about enlisting in the United States Army Reserve. Her recruiter was Sergeant Mark Clifford. He states that his daughter was taken to the Cross Lanes area to take the ASVAB test, and that Sergeant Clifford offered to take her to a bar to have drinks, and that she declined to do so. Then tried to get her to allow him to buy beer, so they could drink beer in the car, she declined to do so. He states that according to his daughter that Sergeant Clifford made sexual advances to her, and that she pushed him away and that he pulled her hair and assaulted her physically, but not sexually. I advised Mr. Cooper that we would like to talk with his daughter for an interview and a statement. He stated that he would bring her in on this particular day at approximately 1300 hours.

Ms. Cooper arrived at headquarters at approximately 1250 hours. She was identified as Kimberly Ann Cooper, age 18, date of birth 3/14/79, SSN 233-27-0449; P O Box 287, Dawes WV 25054; PS# 595-5177. Ms. Cooper gave a statement but stated that she wasn't sure she wanted to press charges. She stated that she met the recruiter through East Bank High School. In October of 1997, he took her for an ASVAB test. She stated that they met at the Kanawha City Mall, at Burger King. There were supposed to be some other members of the school that wanted to join the Army present, but there was not. She states that he took her to Taco Bell in South Charleston, offered her something to eat, she declined. Bought himself a soft drink, sat on the parking lot in the Army recruiting Jeep, and was going to fill out some paperwork, asked her if she wanted to go to a bar lāter, she said, "no". Grabbed her by the hair of the head, jerked her head back, and said "I bet you like it rough, baby". She stated "no", said "take me home". He said, "no, are you going to go take the test"? He then took her to take the test, she completed the test, and on the way home he started attempting to touch her breasts, patted her on the buttocks, and twisted her arm on two different occasions and pulled her hair again three more times. She states that she was in tears and very upset, and decided that after she got home she told her parents part of what had happened, and decided not to have any more contact. She states that the Sergeant was very angry with her after she pushed him away and told her to "get the fuck out of the Jeep" and drove off squalling his tires. Ms. Cooper stated that she would think about this over the weekend and call me back to let me

know if she was going to press charges. She did advise that she would cooperate in the Army investigation.

On Monday, January 12th, 1998 at approximately 1115 hours, I took evidence to the State Police Crime Serology Lab. This evidence included the sexual assault examination kit, obtained by Corporal Brick at Women and Children's Hospital from the victim, Sara Lilly. As well as the clothing that Sara Lilly wore prior to the sexual assault, and the clothing that she wore subsequent to the sexual assault. This was submitted to Trooper H. B. Myers, a personal delivery from me.

On Wednesday, January 14th, 1998 at approximately 1400 hours, I met with First Sergeant Dean. Who is the First Sergeant of the St. Albans Recruiting Command Company. First Sergeant Dean states that on the morning of December 31, 1997 he questioned Sergeant First Class Clifford as to where he had been the night before, why his wife had called all night looking for him, and why the victim's mother had been calling all night looking for her. He states that Sergeant First Class Clifford told him that he took the applicant home on the evening of the 30th to a friends house named Angie. That he didn't know why his wife had been calling all night looking for him, because he had told her he was going to be late. Sergeant First Class Clifford insisted that he did nothing inappropriate. This statement was obtained from First Sergeant Dean.

On Friday, January 16th, 1998 I met with Angela Marie Vanatter, she goes by the name of Angie, at the St. Albans Police Department. I obtained a statement from Angie Vanatter. In her statement she states that she did not see or hear from the victim on December

the 30th, 1997 as indicated by the accused. She did not attend the movies at the Kanawha Cinemas, and Sara Lilly did not come to her house and spend the night. She says that the next time that she saw Sara Lilly was approximately 9:00 AM on the morning of the 31st of December. She stated that Sara Lilly came to her house, was wearing sweat pants and a sweat shirt, which was very unusual for her to wear because she doesn't dress that way, and that she was clearly upset. She set in the floor and started holding her head, and set and told her something terrible had happened. When Angie Vanatter had questioned her further, Sara Lilly indicated that she had went to the movies the night before with her Army Recruiter, and afterwards he had taken her to a bar in South Charleston, and got her drunk, provided her with alcohol and she became intoxicated. She told Angie Vanatter that at some point in time, Sergeant Clifford, the accused, went to the restroom and she laid her head on the table and apparently passed out. The next thing she remembered, was that she was in the shower, naked, and was with Sergeant Clifford, who was also naked. Angie Vanatter states that she talked her into contacting her mother, her mother came and got her.

She also states that two to three days later, an unknown man came to her residence and stated that he was looking for Sara Lilly. Angie asked him who he was, he declined to answer at that time, and stated that Sara and her Mom were fighting. Again, Angie Vanatter asked him who he was, he again he declined to answer the question, and said, "you know that Sara Lilly can get in a whole lot of trouble, I need to find her". Again, Angie Vanatter asked him who he was. He stated Mark Clifford. She said, "Mark Clifford,

who are you"? Sergeant Clifford stated, " a friend of Sara's". At that time Angie Vanatter realized that he must be the Army Recruiter, and she slammed the door in his face, and he went away.

On Tuesday, January the 20th, 1998 at approximately 1515 hours, I met with Kevin Farrell and Jim Alderson. Kevin and Jim are employees at Griff's Pub where the accused took the victim to get her intoxicated. Kevin Farrell, whose girlfriend is the owner of the pub, stated that he knows Sergeant Clifford, the accused, from his many visits in the pub, usually at lunch time. He states that he observed him in there with the young female. When shown a photograph of the victim, he indicated that he was able to recognize her. He stated that he first really noticed her when she was lying face down on the table vomiting. He stated that he determined immediately that she was extremely intoxicated and he approached the accused and told him to get her out of the pub. He stated that the accused argued with him briefly and told him that she was okay, but Mr. Farrell insisted that they get her out. The accused, according to Mr. Farrell, suggested that he assist him in carrying her, the victim, out of the establishment. Mr. Farrell stated that the victim was so intoxicated at that time that she couldn't stand up, didn't even appear to be conscious. Stated that she was carried and placed in a white Army Jeep.

Mr. Alderson, who is the bartender, indicated that Mr. Clifford, the accused, bought the drinks, and supplied the victim with these drinks. Stated that he also noticed the victim for the first time when she appeared to be very intoxicated and stated that he did talk with her when she first came into the bar, briefly, when he checked her ID. There is no indication, however, that this

ID was checked, and I believe that he may have fabricated this story just to cover himself, afraid that they might be in trouble with the ABC Commission for serving an underage drinker. Mr. Alderson was shown a picture of the victim and he identified her as the young lady that was in the club with the accused. He stated that when he noticed her again, she was severely intoxicated and passed out at the table and had to be carried out by Mr. Farrell and Mr. Clifford.

WITNESSES:

Lilly, Sara
Address: Rte. 4 Box 227
St. Albans, West Virginia 25177
Telephone Number: (304) 727-3419
Date of Birth:3/4/80
Social Security Number: 234-35-2518

Can testify to being the victim of a sexual assault and can identify the accused and will offer details into the events of the crime.

Lilly, Pam
Address: Rte. 4 Box 227, St. Albans, West Virginia 25177
Telephone Number: (304) 727-3419 (Home)
(304) 348-4341 (Work)
Date of Birth: 3/4/54
Social Security Number: 234-35-2518

Can testify to taking the victim to meet the accused and her not coming home until the next day. She will also testify to the victim reporting the crime to her.

First Sergeant Jeffrey L. Dean, United States Army
Address: 142 MacCorkle Avenue South West
St. Albans, West Virginia 25177
Telephone Number: (304) 727-5673
Date of Birth: 12/19/59
Social Security Number: 525-21-4721

Can testify to interviewing the accused on the morning after the crime as to his whereabouts and where he took the victim. He will testify to the fact that the accused lied about where he was the night of the crime.

Cooper, Kim
Address: P. O. Box 287, Dawes, West Virginia 25054
Telephone Number: (304) 595-5177
Date of Birth: 3/14/79
Social Security Number: 233-27-0449

Can testify to having a previous experience with the accused. She was a candidate for the Army and the accused attempted to seduce her into drinking. When she rejected his advances, he assaulted her by means of battery.

Sergeant First Class Raymond G. Adkins,
United States Army
Address: 142 MacCorkle Avenue South West,
St. Albans, West Virginia 25177
Telephone Number: (304) 744-6491
Date of Birth: 3/27/62
Social Security Number: 384-82-2400

Can testify to seeing the accused in Griff's Pub on 12/30/97 with the victim and to the intoxicated condition of the victim.

Sergeant First Class Charles L. Blevins,
United States Army
Address: 142 MacCorkle Avenue South West
St. Albans, West Virginia 25177
Telephone Number: (304) 744-6491
Date of Birth: 5/2/66
Social Security Number: 406-11-6366

Can testify to seeing the accused in Griff's Pub on 12-30-97 with the victim and to the intoxicated condition of the victim.

James L. Alderson
Address: 1414 West Virginia Avenue
Dunbar, West Virginia 25604
Telephone Number: (304) 768-0129
Date of Birth: 9/29/67
Social Security Number: 232-21-4191

Can testify to observing the victim in the bar whit the accused and to how incapacitated she was when they departed from the bar.

Kevin J. Farrell
Address: 204 Powderhorn Road
Charleston, West Virginia 25314
Telephone Number: (304) 435-0744 (Pager)
Date of Birth: 5/25/59
Social Security Number: 172-46-5197

Can testify to how intoxicated the victim was and arguing with the accused about having the victim in the bar. He will also testify to assisting the accused in carrying her out of the bar and that she was unconscious.

Angela Marie Vanatter
Address: 500 B Holley Street
St. Albans, West Virginia 25177
Telephone Number: (304) 490-7520 (Boyfriend's Pager)
Date of Birth: 4/16/80
Social Security Number: 233-21-5486

Can testify to the victim coming to her residence on 12/31/97 and telling her about the crime and as to her emotional condition. She can also testify to the accused coming to her residence approximately three days later looking for the victim.

Corporal D. A. Brick
Address: Kanawha County Sheriff's Department
St. Albans Detachment
P.O. Box 75087
Charleston, West Virginia 25375
Telephone Number: (304) 357-0175

Can testify to the initial report and conducting the initial investigation.

Detective, Corporal R. L. West
Address: Kanawha County Sheriff's Department
Criminal Investigative Section
P. O. Box 75087
Charleston, West Virginia 25375
Telephone Number: (304) 357-0175

Can testify to all facts contained and set forth in this report.

CONFESSIONS AND STATEMENTS OF THE ACCUSED:

The accused declined to give a recorded statement. However, he did offer an oral statement that directly conflicts with the evidence and other statements obtained

MILES TRAVELED:

120 Miles traveled.

MAN HOURS SPENT:

60 Man hours spent.

/S/ R. L. West
Detective R. L. West
Criminal Investigative Section
Kanawha County Sheriff's Department

Copies to: The Sheriff
Prosecuting Attorney
LED Files

blh
03/03/98

DATE: FRIDAY, JANUARY 9, 1998
TIME: 10:47 HOURS

STATEMENT OF
SGT. FIRST CLASS CHARLES L. BLEVINS

THIS IS A STATEMENT OF SGT. FIRST CLASS CHARLES L. BLEVINS OF THE UNITED STATES ARMY RECRUITING. DATE OF BIRTH IS 5-2-66. SOCIAL SECURITY NUMBER IS 406-11-6366. ADDRESS IS #9 RIVERWALK PLAZA, SOUTH CHARLESTON, KANAWHA COUNTY, WV. PUBLIC SERVICE 304-744-6491. THIS STATEMENT IS BEING OBTAINED BY DETECTIVE CORPORAL R. L. WEST OF THE KANAWHA COUNTY SHERIFF'S DEPARTMENT, CRIMINAL INVESTIGATION SECTION.

Q: Could you state your full name please?
A: Charles Lee Blevins, Jr.

Q: How old are you Sgt. Blevins?
A: 31 years old.

Q: You're a recruiter and on active duty of the United States Army is that correct?
A: Yes sir. I'm active reserve recruiter at the time.

Q: How long have you been in the Army?
A: 13 ½ years.

Q: You're currently stationed in South Charleston?
A: Yes sir.

Q: Do you have a fellow recruiter there named Mark Clifford?

A: Yes sir.

Q: As you are aware there is a both a criminal and military investigation being conducted into activities of Sgt. Clifford?

A: Yes sir.

Q: On December 30, 1997 in the evening hours it's reported by the victim that Sgt. Clifford took her to Griff's Pub which is located just a few doors down from the Army Recruiting office there at Riverwalk Plaza in South Charleston. He supplied her with alcohol and she became very intoxicated and had passed out. It's my understanding when talking to Sgt. Adkins that you and Sgt. Adkins were also in that pub that night is that correct?

A: Yes sir.

Q: About what time did you arrive there?

A: Approximately 8:30.

Q: Approximately what time did you leave?

A: Approximately 10:30.

Q: If you would just tell me in your own words what you saw from the time that you got there and the time you left?

A: When I walked in I noticed Sgt. Clifford sitting to the right of the bar of a small table. There was a female with them. I didn't stop at the table he motioned at Sgt. Adkins and Sgt. White were in the back and I kept walking and went on back

there. I asked them who that was with him and they didn't know. We thought it was just somebody that came up to talk to him or whatever and didn't think to much more about it. Sgt. Adkins left and I was still standing at the back of the bar neat the restroom watching the karoke, that's why we was there that night and wasn't paying to much to Sgt. Clifford and didn't even know if they were still there for sure, it was hard to see because it was pretty crowded. Then one of the owners of the bar came to my table and asked if I was with the young lady at the table over there because she was really drunk and I stood up to see who it was and I noticed that that's where I had seen Sgt. Clifford and the young lady that was sitting with him sitting. But Sgt. Clifford was not there at the time. I said, "I'm not sure" because I couldn't see her you know for sure, if it was the same person that I had seen or what she looked like or anything because Sgt. Clifford wasn't there. About that time Sgt. Clifford walked passed me, I guess he had went to the restroom and went on up to the table and I hadn't seen him go in there or anything. Then he went over to and started helping the girl up from the table and everything and by that time Kevin the owner of the bar had already went over there too and was helping him get her to the door. So then I knew that that was the same people or the same one that he was with when he came in. By the time I got to the door to see what was going on one of the waitresses was helping him carry her out to the parking lot or walk her out. I wasn't paying much attention cause I was going

to go over to the recruiting station and I hollered at him as he was walking out to see if he wanted to bring her over to the station to sit down on the couch and see if she's okay. About that same time Myrna the owner of the bar came outside and she was very upset and she was trying to ask me what was going on so I walked back to her and I said, "I don't know I don't know who the girl is, I don't know what happened or anything like that". She was concerned about the girl and asked me if I would go out and see if she was okay. So I started walking out to the parking lot and Sgt. Clifford was pulling out and what I assumed was probably a government Jeep, it was a white Jeep I didn't take a look at the tags or anything so I'm not 100% sure that it was. That's what I pretty much figured I guess. He was pulling out so I had to run out there to catch up the vehicle and I said, "Hey is everything alright, what's going on"? and he said something like, "Yeah everything is okay" or whatever and took off out of the parking lot and I went back into the bar and pretty much didn't know what had happened and the people in the bar was asking me what was going on and I didn't know so I stayed there for just a little bit longer and went on home and called Sgt. Adkins and told him what had happened and went on to sleep. About 4:00 in the morning Sgt. Clifford's wife, Bea called me. She was kind of upset and wandering where Sgt. Clifford was. I didn't tell her that I had seen him but I also just told her that I didn't know where he was at because I didn't know what to say.

Q: You didn't lie to her you just didn't tell everything you knew about it?

A: Right. Yes sir. At that time I knew that something wasn't right because here she's wandering where he is at and it's 4:00 in the morning. So I knew then that he apparently wasn't with a friend of the family that night or you know...so kind of wandered the rest of the night that was going on. Got a little early and went on into work. Go there and around 8:00 I think Mrs. Pam Lilly called me, called the office looking for Sgt. Clifford and I told her that he wasn't there and that could I take a message. She told me, "Well he came to pick my daughter yesterday afternoon to take her to the library to get her GED". She hasn't seen or heard from her since. At that point I start thinking, you know hopefully this is not the same girl that was in there last night.

Q: Did you start to think that it probably was?

A: Yeah well it's definitely occurred to me because his wife is calling me wandering where he is at and he was with a girl last night that at that bar and then this applicant's mother is calling in. But at the same time it seemed to hard to believe that that would be the case. So anyway his wife calls again pretty much right after that and she still hadn't heard from him. Which I was hoping by that time he had shown up at home or something. She said, asked me again if I had seen him or if I knew where he was at or if he had been in the office and I said, "No". I said, "He's not home yet"? and she said,

"No" and she got very upset and you know saying that she was coming down there or whatever and she did come down to the office and made a couple of calls while she was there, I'm not sure who she talked to but she had calmed down by that time and apologized to me for going off on the phone which I told her that was alright. We was still looking for him and hadn't heard from him. The government Jeep, Sgt. Adkins had Sgt. White go check to see if it was in the area and it was gone also.

Q: This would have been the same govern-ment Jeep that you seen him leaving with the girl?

A: That same, well it turned out to be yes sir.

Q: How many of those Jeeps do you have assigned there?

A: One. Just the one.

Q: Sgt. Clifford usually drive it or do you all drive it?

A: Yes he's the primary operator of the vehicle. Still hadn't heard from him. I informed Sgt. Adkins when he got in around 9:00 that the lady called looking for her daughter. So he called her and was asking her what was going on and he would try to find out what was happening. He had made some phone calls at that time since we had an applicant's mother looking for her daughter, he had to inform the chain of command what was going on. So he called the Commander and the First Sergeant I believe and informed them what was going on and I think they informed Battalion

Headquarters that there was an incident and don't know really what was going on right now but we're trying to find out. Eventually I think that's all that happened up until Sgt. Clifford called in from somewhere and I didn't talk to him. He apparently acted like you know, what's wrong, what's going on? But we hadn't seen him all day and he hadn't called and talked to nobody and his wife hadn't heard from him and he was asking him where he was and all of that, Sgt. Adkins was. Told him that he needed to get into the office. When he got into the office the Commander and First Sergeant had already came down there and was waiting and he went, they took him to the back room and was asking him where he had been, what went on, made him write a statement I think or the First Sergeant wrote down what his story was or whatever. He was claiming that, from what I understand that they was isolated incidents that he had dropped off the young lady at the, after they had found out that the test wasn't happening or something that he dropped her off at a girlfriends house and after that he went to Griff's and he was there with a personally friend of his, I believe a male friend and a female friend. But I don't know exactly what....

Q: Did you ever see a male friend in there?
A: No sir.

Q: Was there a male friend in the Jeep when he left with the female?

A: Not that I saw sir. Anyway they took his story his down and Sgt. Adkins continued to call and find out if the mother had located the daughter because at that time we didn't know really what was going on and the grandmother told him that she had went to look for her. At a friend's house. Well we never heard back from the mother or anybody. Then it was the, I think the four day weekend came and I guess all of us was hoping that this was just coincidental and that everything was just fine. But when we got back into work Monday we started hearing everything and found out that that actually was the girl and that's about it I guess.

Q: Is everything you've told me been the truth Sgt. Blevins?

A: Yes sir.

Q: Would you testify to that in court if asked to do so?

A: Yes sir.

STATEMENT OF CHARLES BLEVINS
STATEMENT CONCLUDED AT 10:57 HOURS.

/s/_____
SGT. FIRST CLASS CHARLES BLEVINS

WITNESS:_____

lmw
1-13-98

DATE: THURSDAY, JANUARY 9, 1998
TIME: APPROXIMATELY 10:27 HOURS

STATEMENT OF MARK MARCH

THE FOLLOWING IS A RECORDED STATEMENT OF MARK A. MARCH. AGE 30, DATE OF BIRTH IS 9-7-67. SOCIAL SECURITY NUMBER IS 235-21-6367. ADDRESS IS P.O. BOX 216, PRATT, WV 25162. PUBLIC SERVICE IS 304-442-4950. THIS STATEMENT IS BEING OBTAINED BY DETECTIVE CPL. R. L. WEST OF THE KANAWHA COUNTY SHERIFF'S DEPARTMENT, CRIMINAL INVESTIGATION SECTION.

Q: Could you state your full name please?
A: Mark Anthony March.

Q: How old are you Mark?
A: 30

Q: Mark, do you know a guy named Mark Clifford, Sgt. 1st Class Army Recruiter?
A: Yes sir.

Q: How is that you know him by your desire to go into the Army?
A: Yes sir.

Q: How long have you known him?
A: A couple of months, several months I guess. Somewhere along that lines.

Q: You don't know a female named Sarah Lilly do you?

A: No.

Q: She and talking a few minutes prior to this statement she is a young lady. 17 years old from St. Albans and was planning on joining the Army and she's made allegations that on December 30, 1997 Sgt. Clifford picker her up about 1:00 p.m. and took her to get a GED test, the school was closed and then took her to lunch and then took her to the movies, then took her to a bar and got her intoxicated and then took her to the 48 States Motel and the evidence would indicate that they arrived there at approximately 11:00 p.m. and that he had sex with her during the night and then took her home or took her to a friends house the following morning. Now when talking with Sgt. Clifford yesterday he indicated to me that his alibi for that night was that he had spent the night with you arriving there sometime in the evening hours, is that true?

A: No.

Q: Had he ever contacted you and asked you to be an alibi witness for him?

A: Yes.

Q: Just tell me in your own words you're an ex-police officer, you know what I'm trying to get at here. So just tell me in your own words here what this is all about?

A: Basically Sgt. Clifford contacted me I believe it was on the 31st or maybe it was, yeah I believe it

was the 31st, roughly that he had a problem that he had a female recruit that got drunk and passed out on him and he didn't know what to do with her. Puked all over him and he panicked, he didn't know what to do. He took her and dumped her off in a motel and left her there and tried to clean her up and clean the vehicle up and you know basically that was it, trying to....

Q: He said that he took her to a motel?

A: Yes. To a motel. Just put her there that night so she could sober up and so forth and clean her up before he took her home because he knew that they was supposedly having some family problems. That was basically it, I was supposed to say, if anybody asked where was he, he was with me. Then it snowballed, it got bigger...the mother calls and says that there's a problem that he got her drunk and took advantage of her and he told me that that never happened, you know that it just didn't happen, I don't know why she's after me. I really don't understand this and so forth. I said, "Well you know...", I took him for his word. You know situations happen and you know, he told me that if anybody asked just to say that "I was with you that night".

Q: When did he call and ask you to come in here with him this morning?

A: It was yesterday. Yesterday morning.

Q: Now you haven't lied to me in anyway obviously...was your purpose to come here this morning then just to assess the situation and get a feel for it yourself?

A: Exactly. Exactly.

Q: You're getting his version of what happened and you've asked me several questions prior to this so obviously your pretty curious about what really happened?

A: Yeah. You know I only got one side of the version I don't know the little girl, I don't know...

Q: He didn't go into a lot of detail though then he asked you to account for his time on that night?

A: Yeah just basically that.

Q: How long have you been a police officer Mark?

A: Oh I guess going on about 11 years.

Q: You're not working as a policeman actively right now?

A: No sir.

Q: You're preparing to go into the Army?

A: Processed to go into the Army any day.

Q: So that's the only way that you know him is through the Military?

A: Through the Military. We're casual friends. We're friends outside the Military environment.

Q: But you met him through the Military?

A: Through the Military. That's the first time I've met him.

Q: Did you feel intimidated at any time or at least did you feel that your opportunity to go into the Military might be somewhat stopped if you did not assist him in someway?

A: Somewhat but not a whole lot.

Q: Not anything he said?

A: No he didn't say, "You know if you don't help me out your not going to be able to go into the Military" nor nothing like that. I just took him at his word that you know that the girl was a problem child and she went out and got drunk and he didn't know what to do. Just to try to help him out. Like you said I didn't really get the whole...the whole jest was not coming around. There's a piece of the pie missing.

Q: Did you see him at all on December 30?

A: No I talked to him on December 30. I talked to him on the phone sometime that day. He was at the office.

Q: About what, about your career goals?

A: Yeah, just, actually we was supposed to go hunting me and him and he couldn't give me a date of when he could go and that was it. That's the last time that I talked to him until I think the next day. I believe it was the next day.

Q: Now that we've talked about this case and I've shown you some of the evidence that's developed do you believe his story at this time?

A: No. It would be kind of hard to believe.

Q: Is there anything that you need to add to this statement that perhaps I neglected to ask you Mark?

A: No not really.

Q: Anything that you would like to delete or take away from the statement?

A: No. That's about the best I can say. You know that's what basically happened, my part of it anyway.

Q: Has everything you've told me been the truth?

A: Yes.

Q: Would you testify to this in court if we asked you to do so?

A: Yes.

STATEMENT OF MARK MARCH

STATEMENT CONCLUDED AT 10:32 HOURS.

_____

MARK MARCH

WITNESS:_____

lmw
1-9-98

DATE: TUESDAY, JANUARY 6, 1998
TIME: APPROXIMATELY 15:37 HOURS

STATEMENT OF AARON R. LILLY

THE FOLLOWING IS A RECORDED STATEMENT OF AARON R. LILLY, AGE 19. DATE OF BIRTH IS 4-30-78. SOCIAL SECURITY NUMBER IS 234-35-1799. RESIDE AT RT. 4 BOX 227 ST. ALBANS, KANAWHA COUNTY, WV 25177. PUBLIC SERVICE IS 304-727-3419. THIS STATEMENT IS BEING OBTAINED BY DETECTIVE CORPORAL R. L. WEST OF THE KANAWHA COUNTY SHERIFF'S DEPARTMENT, CRIMINAL INVESTIGATION SECTION.

Q: Would you state your full name please?
A: Aaron Ray Lilly.

Q: How old are you Aaron?
A: 19

Q: You are the brother of Sara Lilly?
A: That's right.

Q: You're aware that there is an investigation being conducted against Sgt. 1st Class Mark Clifford of the U.S. Army Recruiting Center?
A: Yes.

Q: And that the allegations are that he sexually abused or sexually assaulted your sister?
A: Yes.

Q: This would have occurred on the evening of December 30, 1997 which was last week?
A: That's right.

Q: She came home on the morning of December 31, 1997 which would have been on a Wednesday. The reason that we're taking this statement from you because I understand that you had a phone conversation with Sgt. Clifford is that correct?
A: That's correct.

Q: When was this phone conversation?
A: Saturday.

Q: This past Saturday?
A: Just this past Saturday.

Q: That would have been Saturday, January 3, 1998?
A: Yeah.

Q: Did you call him or did he call you?
A: He called me.

Q: Was he specifically wanting to talk to you or did you just answer the phone?
A: No I just answered the phone. He wanted to talk to my mother.

Q: He called your house at 727-3419?
A: That's right.

Q: About what time of the day was that?

A: I think it was around noon or so. No it was exactly around 11:30 I think because he woke me up.

Q: Because you work nights right?

A: That's right.

Q: Just tell me basically what the conversation was?

A: He called and wanted to know if my mom was here and I told him no that they had gone out and he had asked me if I knew when they would be back and I was like, "No" and then he asked me what was going on. I told him pretty much that I can't say anything at first and he just kept pushing and pushing and I told him I said, "Well from what I heard you took Sara out and got her drunk and took advantage of her". From then on it was nothing but, "Well this is a crock of shit" and cussing and carrying on and just, you know just going on about that how it wasn't true and he had two buddies that could prove that he was somewhere else. I was just like, "Well whatever", I told him that if he didn't do it you don't have anything to worry about but he still was kind of jumpy and just talking on I just kind of let him talk.

Q: He indicated that he had two friends that would alibi him?

A: Yeah he said that he had a couple of buddies that could say that he was somewhere else.

Q: Did he indicate to you who these people were?

A: No he didn't say.

Q: Did he indicate whether they were military people or not?

A: No he just said a couple of buddies.

Q: Okay. Is that about it?

A: That's pretty much it.

Q: You haven't talked to him any other time than that?

A: No.

Q: You don't know this guy then?

A: No.

Q: Would you know him if you saw him?

A: Oh yeah.

Q: Where have you seen him before?

A: He came to the house when Sara asked for some information with the Army, he was interviewing her or whatever they do.

Q: I'm sure you know your sister pretty well you've lived with her most of her life right?

A: No verbal response.

Q: Do you believe your sister in the allegations that she's made?

A: Yeah.

Q: Is anything that I've neglected to ask you that might be important that you want to tell me?

A: No.

Q: Is everything you've told me been the truth?
A: Yeah.

Q: Would you testify to that in court if asked to do so?
A: Yes.

STATEMENT OF AARON LILLY

STATEMENT CONCLUDED AT 15:41 HOURS.

_____
AARON LILLY

WITNESS:_____

lmw

1-12-98

DATE: TUESDAY, JANUARY 6, 1998
TIME: APPROXIMATELY 9:57 HOURS

STATEMENT OF PAMELA R. LILLY

THIS STATEMENT IS OF PAMELA R. LILLY. DATE OF BIRTH IS 5-4-54. AGE. 43. SOCIAL SECURITY NUMBER IS 236-88-5627. ADDRESS IS RT. 4 BOX 227 FERREL RD., ST. ALBANS, KANAWHA COUNTY, WV 25177. PUBLIC SERVICE IS 727-3419 (H), 348-4341 (W). EMPLOYED BY CAMC MEMORIAL DIVISION. THIS STATEMENT IS BEING OBTAINED BY CPL. R. L. WEST OF THE KANAWHA COUNTY SHERIFF'S DEPARTMENT, CRIMINAL INVESTIGATION SECTION.

Q: Would you state your full name please?
A: Pamela R. Lilly.

Q: How old are you Pam?
A: 43

Q: You're the mother of Sara Lilly?
A: Yes sir.

Q: She is 17 years old?
A: 17.

Q: Did there come a time that your daughter was interested in joining the Army?
A: Yes.

Q: How long ago was that?
A: Approximately 2 to 3 weeks.

Q: Did there come a time that you met Sgt. Mark Clifford her Army recruiter?

A: Yes sir.

Q: I understand from talking with her and reading the report prepared by Cpl. Brick that on the morning of December 30, 1997, last Tuesday?

A: Yes.

Q: A week ago today, I guess you took her to the St. Albans Library to meet with Sgt. Clifford for the purpose of some testing?

A: Yes sir.

Q: Do you remember approximately what time that was?

A: It was 1:00.

Q: It was 1:00 in the afternoon then not morning?

A: Yes sir 1:00 in the afternoon.

Q: She didn't come home for awhile?

A: She didn't come home all night.

Q: When did you start becoming concerned?

A: Late in the evening.

Q: Did you start calling around and trying to find her?

A: There was no place to call that I thought, because I knew she was with him and I didn't know that she would go any place else. She had called me around 4:00.

Q: What did she say?
A: She said that they were going to see a movie.

Q: Were you concerned at that time, did you think that was inappropriate in anyway?
A: No Sara called and checked in that was okay.

Q: Well I guess the Army Recruiters kind of razzle and dazzle these kids anyway they can to get them into the military?
A: I think so.

Q: When you were concerned she was missing, did you start calling any of her friends to see if they around?
A: No sir. I didn't.

Q: When did you first find her after that?
A: In the morning of the 31st at approximately I went to Angie's house.

Q: Did you call before you went or just went there?
A: She has no phone I went there.

Q: She was there?
A: Yes.

Q: What did she tell you where she had been and what had happened?
A: In the car she had told me that they had, her and Sgt. Clifford had gone to the movies and he had taken her to eat in Cross Lanes and then they went to Griff's and she got drunk and then he took her to a motel.

Q: Did she say what motel?
A: I don't think she did at that time.

Q: How did you later find out that it was the 48 State Motel?
A: At the emergency room at Women and Children's.

Q: She remembered that?
A: Yes.

Q: So she told you this, I'm sure you were upset...did you call, on the following day on the 31st did you talk to Sgt. Clifford at any time?
A: Yes sir I did. It was before I went to get her that's how I knew...

Q: He told you that she was at Angie's?
A: He told me that she had met Angie at the movies that evening and had stayed with Angie at the movie theater.

Q: Did she tell you that was Sgt. Clifford told her to tell you?
A: Yes sir she did.

Q: When, after you talked to her and found out what had happened where did you go then?
A: I went straight home then but I called my family physician and...

Q: Is that Dr. Hays?
A: Dr. Hays.

Q: What is his first name?
A: Richard.

Q: Where is he located in South Charleston?
A: South Charleston beside the One Valley Bank I think near Dee St.

Q: Okay. What occurred then?
A: I took her right in and they saw her and he told me that I needed to take her to the Women and Children's Emergency Room because they had that type of set up where they could do all the proper tests.

Q: So then you took her to Women and Children's?
A: Yes.

Q: That's when you met Cpl. Brick from our department and he came and took the initial complaint report?
A: Yes.

Q: Has Sgt. Clifford, have you talked to him since that day?
A: Yes sir.
Q: When did you talk to him?
A: Saturday.

Q: What was the nature of the conversation then?
A: He called and he wanted to know what was going on and I told him that he got my daughter drunk and took advantage of her and her started telling me how untrue that was and that was not right. He was just being a friend to her and

listening to her problems. He was concerned about her and he should have brought her home he said, but he didn't.

Q: He denied spending the night at the motel with her?
A: Yes sir he did.

Q: Did he offer any explanations to why he thought she was lying?
A: No he had no idea.

Q: Is that the last time that you talked to him?
A: Well that was around 4:00 or 4:30 and he wanted to get together and settle this and not go anywhere else with it. So I told him that would be up to Sara and that I will talk with her, she wasn't there at that time and he could call back at 6:00. He did. He called back at 6:00 that same day.

Q: Did you talk to him then?
A: Uh-huh.

Q: What was said then?
A: Sara just wanted to, she didn't want to speak with him then and she just would...whenever she did feel like she wanted to talk with him she would call him. I told him not to get in touch with her at all.

Q: Did you son talk to him at some point and time?
A: Yes sir that same day early I was not there it was early in the morning. Sometime before noon.

Q: But you left it with the fact that your daughter might be calling him back?

A: Yes.

Q: Is there anything that you would like to add to this statement, something that maybe I perhaps neglected to ask you about?

A: I know that he did tell me on the phone on Saturday that he had spoken with Angie her friend and that he was trying to find out how Sara was by speaking with Angie.

Q: Is everything you've told me been the truth?

A: Yes sir.

Q: Would you testify to that in court?

A: Yes sir.

STATEMENT OF PAMELA LILLY

STATEMENT CONCLUDED AT 10:03 HOURS.

_____

PAM LILLY

WITNESS:_____

lmw

1-12-98

DATE: TUESDAY, JANUARY 6, 1998
TIME: 09:32 HOURS

STATEMENT OF SARA E. LILLY

THE FOLLOWING IS A RECORDED STATEMENT OF SARA E. LILLY. DATE OF BIRTH IS 3-4-80, AGE 17. ADDRESS IS RT. 4 BOX 227, ST. ALBANS, KANAWHA COUNTY, WV. 25177. SOCIAL SECURITY NUMBER IS 234-35-2518. PUBLIC SERVICE IS 727-3419. THIS STATEMENT IS BEING OBTAINED BY DETECTIVE CORPORAL R. L. WEST OF THE KANAWHA COUNTY SHERIFF'S DEPARTMENT CRIMINAL INVESTIGATION SECTION.

Q: Could you state your full name please?
A: Sara Elizabeth Lilly.

Q: How old are you?
A: 17.

Q: Do you know an United States Army Recruiting Sergeant 1st Class named Mark Clifford?
A: Yes.

Q: How did you come to know him?
A: He was my recruiting officer.

Q: You say you're recruiting officer, you were anticipating enlisting in the Army?
A: Yeah.

Q: On Tuesday, December 30, 1997 did you meet with him in anticipation of taking your GED test?
A: Yes.

Q: How did you meet up with him that day?
A: My mom drove me to the St. Albans library and he met us there.

Q: Where did you go from there?
A: We went up to Garnet because he said we were going to get my GED.

Q: Garnet that's a school?
A: Yeah I think so.

Q: What happened when you arrived at Garnet?
A: Nothing. Well not the ride there.

Q: When you arrived there what happened?
A: Oh when we got there?

Q: Yes?
A: They were closed.

Q: What did he suggest that you do then?
A: Go get something to eat.

Q: Did you go to lunch with him?
A: Yes.

Q: Where did you go?
A: That Chinese place in Cross Lanes.

Q: Did anything occur there that was inappropriate?
A: No.

Q: Had anything inappropriately up until that time?
A: No.

Q: When you had lunch what did you do then?
A: We went to the movies.

Q: How did you end up at the movies, who suggested that?
A: He did.

Q: Where did you go to the movies?
A: Kanawha City.

Q: At the Kanawha Cinemas?
A: No verbal response.

Q: Do you remember what movie you saw?
A: Scream 2.

Q: Do you remember what time the movie started?
A: 4:15.

Q: Do you remember approximately how long the movie was?
A: Around a couple of hours I guess.

Q: After the movie where did you go?
A: We started to go back to my house.

Q: Did he pay for everything so far up to this point?
A: Yeah.

Q: So you headed back towards your house, how close to your house did you get?
A: We got like in St. Albans and then he suggested that we go to a bar and we turned around.

Q: Was the bar called Griff's?
A. Yeah.

Q: Why did he suggest the bar, were you having, in reviewing Cpl. Bricks report you were upset about a friend that you had to ask to move out of your house?
A: Yeah.

Q: Tell me about that briefly?
A: About Heather?

Q: Yes.
A: She lives at my house and she's like 17 and pregnant. I felt like I was her mother almost. She stole from us and we couldn't let her stay anymore.

Q: So you had to ask her to move?
A: yes.

Q: Were you upset about this?
A: Yeah that happened the same morning.

Q: Did you tell Sgt. Clifford about this?
A: Yeah.

Q: Did he know that you were upset?
A: Yeah.

Q: In reviewing how did he approach you about you needed a drink:
A: He said that I looked like I needed a drink.

Q: What did you say?
A: I said, "Yeah I guess".

Q: Then you went to the Griff's Bar in Riverwalk Plaza?
A: Well we kind of like joked around about it because I really didn't think he was serious but he was. Then we went there.

Q: Do you know approximately what time you arrived there?
A: I guess around like 7:00 or so.

Q: Was there a lot of people in the bar. I know it's a small bar but was it busy and crowded?
A: It was crowded.

Q: Where did you sit in the bar?
A: In a little table beside the bar.

Q: What did you have to drink:
A: I had two Screwdrivers, two shots of Tequila and a shot of Jack Daniels.

Q: How did you get these drinks?
A: He bought them for me.

Q: Did he know that you were 17 years old?
A: Yeah.

Q: I mean I'm guessing he would he's done paperwork on you?
A: Yeah. He knew I was 17.

Q: Did he say anything to you about you being 17 or did you question him about the fact, how you were getting drinks at 17?
A: Actually I told him I was like, "Well I'm only 17" and he was like "Well when's your birthday"? and I was like, "March 4" and he was like, "Well you just might as well be 18 now". Because I was so close to being 18.

Q: What was the first drink he bought you?
A: A Screwdriver.

Q: A Screwdriver is like orange juice with Gin or Vodka or something?
A: Vodka.

Q: Vodka? Did you drink that one pretty quickly or did you just sort of nurse that along?
A: At first it was a conversational drink but then we started to have a contest to see who could drink the fastest.

Q: What did you talk about while you were in the bar in the beginning?

A: He told me about stuff like that he's done in his life like going to Kenya and Somalia.

Q: Talked about his military career?

A: Yeah.

Q: He's Special Forces, Green Beret?

A: I think he was in Special Forces once I'm not to sure about that. He just basically told me about his trips and about this friend of his named Larry and all this kind of stuff.

Q: You say that you got into a drinking contest how did that come about?

A: He wanted to see if I could drink as much as him. He said that we should have a contest to see who could drink it the fastest.

Q: Did he use the word chug?

A: Yeah.

Q: Do you remember approximately what you drank there and how many?

A: Yeah I drank two Screwdrivers, two shots of Tequila and a shot of jack Daniels.

Q: When you drank the Tequila did you chase it with anything?

A: We had that salt that you lick and the lemon that you like squeeze in your mouth.

Q: Were you starting to become pretty intoxicated?
A: Yeah.

Q: Do you remember two other military personnel, two other recruiter Sergeants that came in and was talking to him?
A: Yeah.

Q: Was there anyone else with you and him other than those two Sergeants?
A: I don't think so.

Q: Do you remember a woman being there?
A: No I don't remember a woman being there.

Q: Did you ever hear him tell these recruiting Sergeants that you were the wife of a friend of him?
A: No because I couldn't hear what they were saying.

Q: How long were they there?
A: Just like a few minutes not really that long.

Q: Then they left?
A: Yeah.

Q: How long do you think they were there at Griff's?
A: I felt like I was there real fast. I felt like everything went by real fast so I'm not to sure about the exact time.

Q: Did you become ill at the bar?
A: Yeah passed out and threw up all over it.

Q: At the bar. Do you remember anybody paying close attention to you or coming over to clean it up or anything like that?
A: No I was passed out.

Q: Did he help you out of the bar when you got ready to leave?
A: That's what he told me. I don't remember.

Q: You don't remember that in detail?
A: I don't remember none of that. I don't remember anything about that.

Q: Do you remember getting in a white jeep.
A: No.

Q: Do you remember being in the white jeep that evening?
A: No.

Q: But you do you remember earlier that evening thought right?
A: Oh I remember. . .

Q: Well I guess what I'm asking you what vehicle were you guys driving around in when you went to lunch and the movies and that sort of thing?
A: The Jeep.

Q: The white Army Jeep?
A: Yeah.

Q: That's like a Jeep Cherokee Station Wagon?
A: Yeah.

Q: Do you remember being in any other vehicle during the night?
A: No.

Q: Now the next thing you remember is what?
A: I remember waking up in a shower stall with him. That's what I remember.

Q: You later determined this to be where?
A: In the 48 States Motel room.

Q: That's on MacCorkle Ave in St. Albans?
A: Yeah.

Q: You say you remember being in a shower stall with him where you dress or un-dressed?
A: I was naked.

Q: You were naked. Was he naked?
A: Yes.

Q: What were you thinking of that time?
A" I really wasn't thinking because I still felt really nasty.

Q: Still intoxicated?
A: Yeah.

Q: Was there any type of sexual contact that took place in the shower?

A: I really I don't know. At the time I remember like looking around and my head like twisting and turning. I don't know if anything happened there or not, I don't think so.

Q: Then the initial report indicates that he led you to bed after that is that what you remember?

A: Yeah.

Q: Did he get into bed with you?

A: Yeah.

Q: Were you both still nude?

A: Yes.

Q: What type of sex acts, now I know this is difficult for you to talk about and we'll just talk about it once but it's very important, what type of sex acts took place in bed with him.

A: He liked messed with me like he fingered me.

Q: He placed his fingers in your vagina?

A: Yeah.

Q: What else?

A: He just, he liked messed around and then he got on top of me and had sex with me.

Q: He had intercourse with you?

A: Yes.

Q: Was there any oral sex that you recall?

A: No. I don't think so.

Q: Did he perform oral sex on you at any time?
A: I'm not sure. I don't think so.

Q: Do you remember having oral sex with him, performing oral sex on him?
A: No. I did not do that.

Q: When you say that he got on top of you and had intercourse about how long did that last do you recall?
A: A while. I know it lasted a while because I kept like trying to close my eyes and stuff and I opened my eyes and he's till be there.

Q: Were you laying on your back?
A: Yeah.

Q: So did the intercourse take place in the missionary position the whole time?
A: Yeah.

Q: A very important question for evidentiary purposes, do you remember if he ejaculated?
A: I don't know. I'm sorry I really don't remember.

Q: Do you remember if he used a condom or anything like that?
A: I don't really think he did, but I'm not positive.

Q: What sort of things did he say to you about this?
A: He liked whispered stuff in my ear like he said that he wanted to fuck me in my ass and he said that he wanted to cum in my mouth. Just nasty stuff like that.

Q: Did he try to do anything like that to you?
A: I don't remember him trying no.

Q: Are you protected sexually, are you on the pill or any type of birth control?
A: No. I'm not really the type of person to go out and have sex a lot.

Q: Were you a virgin prior to this?
A: No I wasn't a virgin.

Q: We're you currently with another sexual partner like a boyfriend or anything like that, actively?
A: No I was not active.

Q: How long would it have been, approximately how long would it have been since you had sex before this night?
A: Probably about 3 or 4 months maybe.

Q: Have you been tested for any type of transferable disease or anything like that?
A: I think they did that when I was at the hospital.

Q: Did you go to sleep after you had sex with him?
A: Yeah.

Q: Pass out. Do you remember if you said yes or no or did you consent to have sex with him?
A: I did not say yes, but I did not say no. But I wanted to say no.

Q: You still consider yourself, to, were you still pretty intoxicated?

A: I was so messed up that I didn't know what was going on until after it happened.

Q: Did you trust this man completely until this happened?

A: Well yeah he's an adult. He's an Army Recruiter. I trusted him.

Q: What's the next thing you remember?

A: I remember waking up the next morning and he told me I should take a shower and I did. Then he gave me some sweats to wear because my clothes had throw up all over them and I put them on.

Q: What did those sweats look like were they military?

A: They, he said that he got them at the military office. They were grey sweat pants and then some like a faded black sweatshirt with something on it. I don't know what. . .

Q: So it wasn't new?

A: No it wasn't new. It was like used.

Q. Do you still have those clothes?

A: Yeah they're at my house.

Q: You brought some other clothes in today that are sitting here, are those your clothes that you wore that night?

A: Yeah.

Q: Are those the clothes that you put back on?
A: No verbal response.

Q: No you put the sweats back on?
A: I put the sweats back on.

Q: You just took these with you?
A: Yeah.

Q: After you had the shower where did you go then?
A: I laid there for a little bit. . .

Q: Did you stay there in the motel for a little while after that?
A: Yeah for a little bit yeah because I laid down and he had to go out to the Jeep and clean it up because I threw up in his Jeep too.

Q: What happened then?
A: Then we got in the Jeep.

Q: Is it day light by this time?
A: Yeah.

Q: The next day?
A: The next morning. He said that I should go to a friends house and he asked me what friend I should go to and I said, "Angie". Because I've been friends with Angie forever. He said that I should say that I met her at the movies and stayed the night with her.

Q: Did you agree to do that?
A: Well yeah. I was scared to death of him I didn't want to make him mad.

Q: Did you first go to your house that morning?
A: We first drove to my house and my mom's car was in the driveway and I knew that if I drove in there with him that my mom would come out and she would kill him. She would. So I told him to bring me to Angie's because I didn't want mom to go to jail or something like that.

Q: Now Angie that's Angie?
A: Angie Vannetter.

Q: She lives in downtown St. Albans?
A: Yeah.

Q: When you arrived at Angie's house, he took you to Angie's house didn't he?
A: Yeah.

Q: Who was there?
A: Angie, Casey and Angie's dad.

Q: Whose Casey?
A: Angie's boyfriend.

Q: Did you tell Angie what had happened to you?
A: Yeah.
Q: Did you tell anyone else?
A: Well Casey was there when I told her.

Q: What's Casey last name?
A: Jones.

Q: Does he live in St. Albans too?
A: No I think he lives in Charleston, in between Charleston and Sissonville. But he's with Angie all the time.

Q: What did you tell Angie, basically just what you told me?
A: Yeah.

Q: Where you upset or crying or anything at that time?
A: I was in shock?

Q: When did you go to your moms house?
A: Actually mom came there because she was calling around looking for me.

Q: Did Angie try to get you to tell your mom what happened, did Angie say anything to encourage you to tell the police or your mom?
A: She told me that I should tell my mom and prosecute the bastard. That's her words.

Q: When did you hook up with your mom that morning, later, just a little later or. . . ?
A: Mom actually came there because she got ahold of him and he told her that I stayed the night at Angie's and that's where I was. She came there and found out that I was there.

Q: Where did your mom get ahold of him at?
A: She told me later that she called up there and he called her back after like he got there or something.

Q: Then you told your mom what had happened?
A: Uh-huh.

Q: Did she take you to the hospital?
A: Well first she took me to Dr. Hays, that's my regular doctor and then he said that I should go to the hospital because they didn't have the kit there.

Q: Where is Dr. Hay's office?
A: In South Charleston.

Q: Okay then you went to Women and Children's Hospital?
A: Uh-huh.

Q: That's when the Deputy Sheriff came and talked to you Cpl. Brick?
A; Yeah.

Q: Is there anything else that you can think to add to this statement that you think is important perhaps I neglected to ask you about?
A: No verbal response.

Q: Has everything you've told me been the truth to the best of your knowledge?
A: Yeah.

Q: Would you swear and affirm to this in court if asked to do so?

A: Yes.

Q: Do you want to prosecute Sgt. Mark Clifford.

A: Yes.

THIS STATEMENT CONCLUDES AT 9:49 HOURS.

_____

SARA E. LILLY

WITNESS: _____

lmw

1-12-98

DATE: FRIDAY, JANUARY 16, 1998
TIME: APPROXIMATELY 15:13 hours

STATEMENT OF ANGIE MARIE VANNATTER

THE FOLLOWING IS A RECORDED STATEMENT ANGELA MARIE VANNATTER. AGE 17. HER DATE OF BIRTH IS 4-16-80. SOCIAL SECURITY NUMBER IS 233-21-5486. ADDRESS IS 500 B HOLLEY ST., ST. ALBANS, KANAWHA COUNTY, WV 25177. NO PHONE. THIS STATEMENT IS BEING OBTAINED BY DETECTIVE CORPORAL R. L. WEST OF THE KANAWHA COUNTY SHERIFF'S DEPARTMENT, CRIMINAL INVESTIGATION SECTION. THIS STATEMENT IS IN REFERENCE TO THE SEXUAL ASSAULT OF SARA LILLY.

Q: Would you state your full name please?
A: Angela Marie Vannatter.

Q: How old are you Angie?
A: 17.

Q: You go by Angie is that correct?
A: Right.

Q: Where do you work?
A: McDonalds in St. Albans.

Q: You live at 500 B Holley St.?
A: Right.

Q: Is that where your parents, your mother lives?
A: My father.

Q: You're real good friends with a girl named Sara Lilly is that correct?

A: Right.

Q: Is it fairly safe to assume that you guys are like best friends?

A: Yes.

Q: On December 30, 1997 as you know she was sexually assaulted by an Army Recruiter named Mark Clifford?

A: Right.

Q: You knew that because she told you that is that correct?

A: Right.

Q: Looking back on that day December 30, 1997 did you see Sara at any time that day?

A: No.

Q: Did you go to the movies in Kanawha City?

A: No.

Q: So you would have not seen Sara at the movies in Kanawha City?

A: Right.

Q: Did Sara come to your house that evening and spend the night with you?

A: No.

Q: Did you see Sara on December 31st 1997?

A: Yes.

Q: What time did you see her?
A: Approximately 9:00.

Q: Now at 9:00 that morning, from 9:00 that morning when was the last time you had seen her prior to that?
A: Probably about a month.

Q: When she came to your house you said you could tell something was wrong how did you know that?
A: Just by the look on her face. The way she was carrying herself.

Q: What did you do when she came in?
A: She came in and she sat in my bedroom floor and put her head between her face, or her face between her hands.

Q: Did you ask her what was wrong?
A: Uh-huh.

Q: Just tell me in your own words what happened?
A: Well she came in and sat down in my floor and I kept asking her what was wrong and she wouldn't tell me and finally she just told me that she went to the movies with her Army Recruiter in Kanawha City and saw Scream 2. She said that after the movie they were talking about going to a bar and drinking and that he took her seriously and they really went. While they were there he went to use the bathroom and she must have passed out.

Q: Did she tell you that she had drinks with him?
A: Right.

Q: Did she tell you that he bought the drinks for her?
A: Right.

Q: Did she tell you what they were drinking?
A: Jack Daniels, Tequila and Screwdrivers.

Q: Did she indicate that she was sick, when you say she passed out?
A: Yeah.

Q: She told me and she seemed to have a little bit of memory loss and the people at the bar say that she was so intoxicated that she was laying face down on the table and they had to carry her out. Is that consistent with what she's telling you?
A: Yeah.

Q: What did she tell you about that exactly?
A: She said that while he was in the bathroom that she put her head down on the bar or on the table and she doesn't remember anything after that.

Q: What was the next thing she told you that she remembers?
A: Waking up in the shower with him.

Q: Did she say where she was?
A: In a motel room.

Q: Did she say what motel she was at?
A. 48 States.

Q: Did she indicate whether or not she had her clothes on in the shower?
A: She had no clothes on is what she told me.

Q: She indicate whether or not he had his clothes on in the shower?
A: Uh-huh she said no.

Q: So he did not have his clothes on?
A: Right.

Q: Then she's indicated to me that she remembers periodically him having sexual intercourse with her, did she indicated that to you or did she remember?
A: No.

Q: Would it be that it was hard for her to talk about it in detail?
A: Probably.

Q: Did you try to get details out of her?
A: I've tried to but she doesn't want to talk . . .

Q: She doesn't want to talk about it?
A: She doesn't want to talk.

Q: Did you know who her Army Recruiter was before this?
A: Uh-huh.

Q: Did you know that she was going to go into the Army?

A: No.

Q: Did you, did there come a time that you met the Army Recruiter?

A: About 3 days after the incident.

Q: Did she tell you what his name was?

A: No.

Q: How did you meet him?

A: He came to my house.

Q: What did he do when he came to your house?

A: He asked me if I had seen Sara.

Q: And was there somebody with him?

A: Yeah.

Q: Can you describe him?

A: He was probably about 5'8 or 5'9. He had short crewcut black hair and that's just about all because he kept his back to me.

Q: Did he say anything?

A: Uh-huh.

Q: How did you figure out it was the Army Recruiter?

A: Because he wouldn't tell me who he was.

Q: Okay just tell me in your own words what happened that time when he came to your house?

A: He came to the house and knocked on the door and my boyfriend was there and he came and got me from my bedroom. When I went to the door he asked me if I had seen Sara and I told him no, not since yesterday. He goes, "Oh you saw her yesterday"? and I was like, "Yeah we went bowling". He said, "So you haven't talked to her today"? and I said, "No". He goes, "You know what all is going on with Sara right"? and I was like, "Who are you"? and he was like, "Well see Sara could get in a lot of trouble". I go, "Who are you"? and he was like, "Mark Clifford".

Q: So you had to ask him several times before he would tell you who he was?

A: Right. I asked him who Mark Clifford was and he just told me a friend of Sara's. So I shut the door in his face.

Q: That's the last time that you've talked with him?-

A: Right.

Q: He left after that?

A: Right.

Q: Did you indicate to anyone or did you tell Sara or Sara's mom that he had been to your house?

A: I told Sara's mom.

Q: Now after Sara told you what had happened the morning she had come to your house did you talk her into contacting her mother?

A: Yeah.

Q: Her mother came and got her is that correct?

A: Right. Her mom came and got her while I was trying to talk her into going home.

Q: She was out looking for her then?

A: Right.

Q: Do you believe Sara Lilly's story?

A" Yes I do.

Q: Why do you believe her?

A: Because she's my best friend I don't see why she would lie about something.

Q: Could you tell that she was upset?

A: Yeah.

Q: Is there anything that you would like to add to this statement Angie that you think might be really important that maybe I have forgotten to ask you about?

A: Not that I know of.

Q: Has everything you've told me teen the truth?

A: Yes it has.

Q: Would you swear to this in court?

A: Yes I would.

STATEMENT CONCLUDES AT 15:19 HOURS.

_____

ANGIE VANNETTER

WITNESS:_____

lmw

1-21-98

DATE: WEDNESDAY, JANUARY 14, 1998
TIME: APPROXIMATELY 14:05 HOURS.

STATEMENT OF FIRST SGT. JEFFREY L. DEAN

THE FOLLOWING IS A RECORDED STATEMENT OF FIRST SGT. JEFFREY L. DEAN OF THE UNITED STATED ARMY, RECRUITING COMMAND. ADDRESS IS 143 MACCORKLE AVE. S.W., ST. ALBANS, KANAWHA COUNTY, WV 25177. TELEPHONE IS 304-727-5673. DATE OF BIRTH IS 12-19-59. SOCIAL SECURITY NUMBER IS 525-21-4721. THIS STATEMENT IS BEING OBTAINED BY DETECTIVE R. L. WEST OF THE KANAWHA COUNTY SHERIFF'S DEPARTMENT, CRIMINAL INVESTIGATION SECTION.

Q: Would you state your full name please?
A: Jeffrey Lynn Dean.

Q: How old are you Sgt. Dean?
A: 38.

Q: What is your current duty assignment with the military?
A: I am the First Sgt. For the St. Albans Recruiting Company.

Q: How long have you been in that current assignment?
A: 2 years and a few months.

Q: Do you know Sgt. First Class Mark Clifford?
A: Yes I do.

Q: Would it be fair to say that you are one of his supervisors?

A: One of his supervisors yeah.

Q: Did there come a time that on the morning hours of December 31, 1997 that you were aware that there may have been impropriety or at least some questions that needed to be asked of Sgt. First Class Clifford?

A: Yes there is.

Q: What is that situation and hot did you come to know about it?

A: One the 31st of December I arrived at the Company Headquarters at approximately 9:30 and was informed by Captain Bodie, The Company Commander that Sgt. Clifford was not at work. I was then put on the phone with Sgt. Adkins from the South Charleston Recruiting Station who told me that Clifford's wife had called him around 4:00 or 5:00 that morning asking where Clifford was and also stated that his government vehicle was missing and that a female applicant's mother had called and said that her daughter had left Clifford the day before which would have been the 30th and was not home yet. I told Adkins that I would be in his office at 11:00 on 31 December. Directly got off the phone with Adkins and informed Sgt. Major Green who it a Battalion Sgt. Major.

Q: Where is he located?

A: Beckley, WV

Q: Okay go ahead.

A: At 11:00 I arrived at South Charleston Recruiting Station and went into Adkins office and at this point Sgt. Blevins, Captain Bodie were both in the office with Sgt. Adkins talking of the incident. Captain Bodie left the office and I talked to Blevins and Adkins both who told me that they and Sgt. White went to Griff's a Sports Bar last night and saw Clifford there with a girl. They did not associate with them and went to the back of the club and had few beers. Adkins left the club, Blevins and White were still there. Blevins said that he want to the restroom and when he came out he saw a commotion. The people working at Griff's were helping the girl Clifford was with outside because she had passed out and was getting sick. Blevins went up to help but one of the Griff's employees, I don't now who it was grabbed him and asked him what was going on. Once Blevins got outside Clifford had the girl in a Blazer and was leaving. He told Blevins, "Everything is okay I'll get them home". At about 12:00 Clifford reported for work. I took him in the back office with Adkins and asked him to tell me why he was late, why his wife called, was the girl in the bar an applicant, where was he all night, where was is GOB? He stated he was late because his wife had had an accident and he was taking care of insurance matters. He did not know why his wife called because he had called her that night and told her not to worry when he got home, he would be late. He stated that the girl at the bar was not an applicant and he stayed at Mark Marsh's home the night before.

A: about 22:30, 30 December 1997. He stated that he put this girl who he wouldn't give a name, said he would not give a name and her boyfriend in his GOB to take them around back for safety reasons because they were too drunk to walk. To put in his POV, privately owned vehicle to take home because they were too intoxicated to walk that far in their condition. I asked him why the applicant's mother had called and said that her daughter hadn't come home. He stated that he took her to Angie's house on 30 December 97 at around 16:00 because the GED place was closed. I called Ms. Clifford and she stated that Clifford did call her not to worry when he got home and verified that she did say she had been involved in a vehicle, minor accident. That evening I called Mark, I'm sorry I'm reading this statement.

Q: That's okay.

A: Had been involved in a minor accident that evening. I called Mark and he said Clifford had arrived around 10:30, 22:30 and did stay there that night and was in his POV. I told him other people may be calling him and asking questions about this and I did not care what he told me as long as he didn't lie and asked if he would be willing to talk to anyone else about it and if he did would his story change. He said he would talk to anyone and he wished not to change his story. At this time I felt no reason to pursue the matter any further because Adkins had called the applicant's home and someone said the girl was located and the mother will call him back later. I reported to Captain Bodie and Sgt. Major Green that everything seemed okay.

Q: Did in fact at the later date you determined or someone in the Army Office determined that the government vehicle was missing? The white Jeep Cherokee? On that night?

A: It wasn't, no.

Q: Wasn't missing when you came in?

A: It was not missing, not that I know of.

Q: So at that point and time without you having any further knowledge of what had occurred Sgt. First Class Clifford's story checked out.

A: It did.

Q: I mean you had called his wife and that sort of thing?

A: Yes.

Q: He declined to identify the identity of the female, did he tell you who the female was?

A: No he did not he said it was a female and her boyfriend.

Q: Is there anything that you can think to add to this statement First Sgt. Dean that you think might be important perhaps that I neglected to ask you?

A: No not that I can think of.

Q: Has everything you told me been the truth?

A: Yes it is.

Q: Would you testify to that in court if asked to do so?

A: Yes I would.

THE TIME IS 14:12 HOURS.

_____

FIRST SGT. JEFFREY L. DEAN

WITNESS: _____

lmw

1-21-98

DATE: FRIDAY, JANUARY 9, 1998
TIME: APPROX. 13:19 HOURS

STATEMENT OF KIM COOPER

THE FOLLOWING IS A RECORDED STATEMENT OF KIMBERLY ANN COOPER, AGE 18. HER DATE OF BIRTH IS 3-14-79. SOCIAL SECURITY NUMBER IS 233-27-0449. ADDRESS IS P. O. BOX 287 DAWES, KANAWHA COUNTY, WV. 25054. PUBLIC SERVICE IS 304-595-5177. THIS STATEMENT IS BEING OBTAINED BY DETECTIVE R. L. WEST OF THE KANAWHA COUNTY SHERIFF'S DEPARTMENT, CRIMINAL INVESTIGATION SECTION.

Q: Would you state your full name please?
A: Kimberly Ann Cooper.

Q: How old are you Kim?
A: 18.

Q: Kim where did you graduate from high school?
A: East Bank.

Q: What year?
A: 1997.

Q: While you were a senior at East Bank High School did there come a time that you were thinking about enlisting in the United State Army Reserves?
A: Yes.
Q: Did you talk with an Army Recruiter about that?
A: Yeah.

Q: Who was that Army Recruiter?
A: Sgt. Clifford.

Q: Was it Sgt. Mark Clifford?
A: Yes.

Q: I showed you a photograph of a guy that was arrested yesterday for sexual assault is that the guy?
A: Yeah that's him.

Q: You're absolutely positive about that?
A: Yes.

Q: Now you indicated to me prior to the statement that sometime around October 1997 after you had already graduated, Sgt. Clifford had contacted you is that correct?
A: Yes.

Q: If you would just tell me a little bit about that contact when he called you?
A: He called me and it was pretty late, he called and he wanted to know what I had been into and what I was doing after graduation and if I was still thinking about the Army. He said that he just wanted to call and talk to me about that and talk to me about the Army and everything. He was just asking me a lot of questions, you know what I was going to do and if I was going to go to school.
Q: Did he finally leading into suggestions that you take the ASVAB test?

A: Yeah. Yeah he said that he thought that I should take the ASVAB test again because they have like a time limit or something on them and he said that it had been so long since I took my first one and I needed to retake it.

Q: Did you in fact do that?
A: Yeah.

Q: How long after you talked to him that night did you go and take the test?
A: It was a week.

Q: About a week?
A: Yeah about a week.

Q: Now you're dad didn't want you to do did he?
A: No.

Q: You're dad's name is what, Kenneth Cooper?
A: Kenneth Cooper.

Q: That's was mainly because he didn't want you to go into the military?
A: Right.

Q: But he had some concerns about you riding alone with an Army Recruiter is that correct?
A: Right.

Q: What kind of arrangements did Sgt. Clifford make with you as to where he would meet you and transport you to Cross Lanes to take the test?

A: He told me to meet him at Kanawha City at the Burger King in the parking lot and he would come and get me and he said that I could go with him and that he would take me back to my car. He said if he couldn't take me back to my car somebody would. He told my dad when he called that he had to pick up somebody else too so there would be somebody else with us. But I met him in Kanawha City and there wasn't anybody else it was just him.

Q: You said things got really weird in your terminology after you got with him. Explain to me when it got weird and what you mean by getting weird.

A: He was just getting really personal. He you know he was asking all the personal questions.

Q: What kind of personal questions?

A: Like boyfriends and you know who I had been seeing.

Q: Did he ask anything specifically about your sex life?

A: No.

Q: Did he bring up the issue of sex?

A: No. He went through the MAC machine at the bank and stuff and he never brought up sex until like later on. You know he never really come out and said. . .

Q: What bank were you at? In Kanawha City?
A: Yeah. I think it's One Valley Bank. It's right there where the mall is.

Q: One of the banks there in Kanawha City?
A: Yeah.

Q: Did he do anything inappropriate while you were going through the bank?
A: No. He asked me, that's when he asked me if I had any money on me and I told him that it wasn't none of his business and then he asked me if I wanted anything to eat and I told him no. Then from the bank we left and went down to the Riverwalk Plaza to the recruiting place. That's where he got my . . .inaudible. . . .

Q: That's in South Charleston?
A: Right:

Q: He had to pick up some paperwork you say?
A: Uh-huh.

Q: Then where did you go from there?
A: That's when we went to Taco Bell. We went, he went through the drive thru and go him something to drink. He asked me again if I wanted anything and I told him no. He pulled around and he parked in the parking lot and I was filling out my paperwork before we got there.

Q: He was doing some paperwork on you?
A: Yeah.

Q: What happened then?

A: Then he was talking about there was some guys crossing the street and he started talking about queers and everything and he was just going on and on and on you know and being and then that's when it started you know. I don't. . . .

Q: He was saying negative things about gay people?

A: Yeah yeah. He was talking about them in the military.

Q. About having gays in the military?

A: Yeah.

Q: He didn't like that?

A: No he didn't like that. He asked me about what I thought about it and I told him you know I really didn't know. That's when it had started because he, that's when he grabbed ahold of my hair, you know like he grabbed ahold of the back of my head and wrapped my hair around his hand, you know and he had jerked my head back and that's when he said, "You like it rough don't you"?

Q. You must have been pretty stunned?

A: Yeah.

Q: That's the very first thing he did physical as far as touch you?

A: Yeah that's the very first thing.

Q: What was your reaction to that?

A: I told him to let go le me and he didn't. Then he started laughing. I really didn't know what to do. I jerked my head back up and he, you know he let go of me.

Q: Was there anyone that witnessed this, anybody around?

A: No there wasn't anybody around. Then he grabbed ahold of my arm and he was twisting my arm and stuff you know how you give Indian burns and he was twisting my arm and everything and when he reached for me and I pushed him away he got mad. He told me that you know that that's when he started all of this stuff is that I was 18 years old and I was old enough to make my own decisions of what I wanted to do you know and not to let my daddy influence me.

Q: He knew your daddy really didn't want you to join the military?

A: Right. After all that happened we left and we was going back to Cross Lanes. He's got a really nasty mouth on him you know every other word is a cuss word. You know I mean he just. . .

Q: Did you feel that that was a little inappropriate him cussing in front of you?

A: Yeah.

Q: I mean for all he knew you might be a religious person or something right?
A: Right.

Q: Did he ask you if it offended you?
A: No. No he never did. We got to Cross Lanes and then that's when he was walking behind me and the tap on the butt you know I don't know. . .

Q: The what, now he did what?
A: He tapped me on the butt.

Q: He smacked you on your buttocks?
A: Yeah I don't know if it was an accident or if he really intended to.

Q: Well was it a hard smack or a pat?
A: No it was like the back of his had because he was really close behind me too. I mean he. . .

Q: Did you say anything when you felt that?
A: I turned around and looked at him. He acted like nothing had happened. So I thought maybe he didn't do it on purpose. So we went in and I took the test.

Q: you indicated earlier before we started recording this that he was trying to touch you on the breast or pinch you or something?
A: Yeah he grabbed for me.

Q: You were pushing him away?
A: Yeah I pushed his arm away.

Q: Did his hand ever touch your breast?
A: No.

Q: How many times did he grab your hair and pull your hair?
A: Probably 3 or 4 times I know.

Q: So then you go in and you take the test?
A: Right.

Q: Then what happened after the test? Well first of all how long did the test take approximately?
A: Two hours.

Q: Two hours?
A: Yeah it was about two hours.

Q: Was he in the room while you were taking the test?
A: No he wasn't.

Q: Were there other people there?
A: Uh-huh. Yeah there was some other people taking the test. After the test was over you know we had to stand in the hallway and get our grade and then he came and picked me back up and you know I walked out to his Jeep, he gave me the keys to his Jeep to unlock the door and I got in and I sat down and he told me that he would be back in a little bit because he was going to go get my, my final grade on the test, you know he was going to do it his self. He went in and then he came back out and we left and he asked me if I wanted to go a bar with him. I told him no.

Then he asked me you know how much money I had on me and he said that if I gave it to him that he would go in the liquor store and you know and buy some beer and we could go somewhere and drink some beer if I didn't want to go to the bar. I told him that I didn't want to do anything to just take be back home, take me back to my car and let me go home. He looked at the clock and he said, "Well it's still early" you know it was like 9:30 and he said, "It's still early". He said, "Can't you call your dad and tell him that the test run late and we can go somewhere"? I told him no I didn't want to. So then he started talking about this motorcycle and all of this stuff. So we get back to Kanawha City and he's still you know pushing on me and doing stuff like that. We get back to my car and he was asking me some questions about my car and I was talking to him and I opened up my door to get out and I wasn't out yet and I was still talking to him and then he said, "I'm going to ask you one more time, do you want to go to the bar with me"? and I said, "No" and he said, "Well get out of my Jeep".

Q: Is that what he said specifically?

A: He said "Get the fuck out of my Jeep". He was really mad, well he seemed like he was really mad. I grabbed my purse and it was like in the floor and I grabbed it and before I could even get out he had already grabbed ahold of the door and slammed the door. You know his tires were squealing and stuff when he went out of the parking lot. He seemed like he was upset.

Q: Did he call you again?
A: No.

Q: Did you ever talk to him again?
A: No.

Q: Did you tell anybody about this happening when it happened?
A: When I got home I told my dad but I didn't tell him everything.

Q: What part did you tell you dad?
A: I told him that he had pulled my hair and stuff like that but I didn't tell him the things that he had said. You know like wanting me to go to the bar with him and stuff.

Q: Did your dad try to get you to call the police to file a report?
A: He wanted me to call down there where he worked and talk to somebody and see what we could do about it.

Q: Why did you not contact the police or make the decision not to call the Army about that?
A: Because I just, I thought that it wasn't really that bad so I just. . . .

Q: Were you cared of him Kim?
A: Yeah.

Q: Are you still scared of him?
A: Yeah.

Q: You're about to cry now. That's the real reason that you didn't do it isn't it?
A: No verbal response.

Q: You're shaking your head yes. Is there anything that you would like to add to this statement?
A: No.

Q: Is everything you've told me been the truth?
A: Yeah.

Q: Would you testify to this in court is asked to do so?
A: Yeah.

STATEMENT CONCLUDES AT 1:32.

_____
KIM COOPER

WITNESS: _____

lmw
1-13-98

DATE: FRIDAY, JANUARY 9, 1998
TIME: 10:27 HOURS

STATEMENT OF SGT. FIRST CLASS RAYMOND G. ADKINS

THE FOLLOWING IS A RECORDED STATEMENT OF SGT. FIRST CLASS RAYMOND G. ADKINS OF THE UNITED STATES ARMY. DATE OF BIRTH IS 3-27-62. SOCIAL SECURITY NUMBER IS 384-82-2400. ADDRESS IS #9 RIVERWALK PLAZA, SOUTH CHARLESTON, KANAWHA COUNTY, WEST VIRGINIA. PUBLIC SERVICE IS 304-744-6491. THIS STATEMENT IS BEING OBTAINED BY CPL. R. L. WEST OF THE KANAWHA COUNTY SHERIFF'S DEPARTMENT, CRIMINAL INVESTIGATION SECTION.

Q: Could you state your full name please?
A: Raymond Guy Harley Adkins.

Q: How old are you Sgt. Adkins?
A: I'm 35 years old.

Q: How long have you been in the U. S. Army?
A: I've been in the Army about 14 years.

Q: What is your job in the Army?
A: I am a Recruiter and am also the Station Commander at the Recruit Station in South Charleston.

Q: Does Sgt. Mark Clifford work for you?
A: Yes sir.

Q: How long have you been assigned to that duty station?

A: Since May of 1997.

Q: Ho long has Sgt. Clifford worked for you?

A: Since that time.

Q: As you know there is both a military and a police investigation into an activity involving Sgt. Clifford. Specifically the allegations have been made by a young female that on December 30, 1997 Sgt. Clifford took her to the Griff's Pubb which is located just in the same building as the Army Recruiting Office in South Charleston and supplied her with alcoholic beverages to the point that she was intoxicated and very ill and unconscious at times. Then too, her to the 48 States Motel in St. Albans and had sexual intercourse with her. Were you in Griffs on the night of December 30, 1997?

A: Yes sir.

Q: Do you remember approximately the times that you were there?

A: Yes sir I was there from 8:00 at night until about 8:30 at night.

Q: Did you see Sgt Clifford in the bar that night?

A: Yes sir I did.

Q: Was he with a female?

A: Yes he was.

Q: If you would just basically tell me in your own words from the time you arrived at the bar until the time that you left?

A: Alright sir I arrived about 8:00. I seen Sgt. Clifford his back was to me and he was sitting down at a table. There was a young lady sitting across from him. I walked up to Sgt. Clifford and I tapped him on his shoulder and said, "Hey Sgt. Clifford what's going on"? and I asked him about a recruiting packet that he was supposed to do this afternoon and he told me that it wasn't done yet. I said, "Okay" and I turned around and went back to the back of the bar. I stayed there for approximately 30 minutes. Sgt. Blevins showed up about 8:30. I then left about 8:30 to go home.

Q: Did there come a time that you heard from Sgt. Blevins about a problem that Sgt. Clifford was having with this young woman?

A: Yes sir. About 11:30 at night Sgt. Blevins called me and woke me up and told me that Sgt. Clifford had that girl that he was with there, or he thought that the girl he was with he wasn't sure, that she was really drunk and that she could hardly stand up and she was passed out and that Sgt. Clifford and one of the waitresses there carried the girl out of the bar and put her in the vehicle and I assume took her home, I'm not sure.

Q: Did you, you obviously contacted your Company Commander Sgt. . . . . inaudible. . . is that correct?

A: Yes.

Q: Later?
A: Not that night.

Q: The following day?
A: The following morning.

Q: I'm assuming that in order for you to have done that you observed, you believe that what you observed was inappropriate is that correct, or what was your reason for contacting your Company Commander and making a statement?
A: Well actually sir I thought it was a little bit odd and Sgt. Blevins called me about that but I really didn't know who the girl was, I didn't know if it was a friend or whatever. But what got really strange that at 4:00 in the morning Sgt. Blevins called me back and told me that Sgt. Clifford's wife was looking for him. So then about an hour later Sgt. Clifford's wife called me and said, "Do you know where Sgt. Clifford is"? and I told her that I seen him last night about 8:00 or 8:30 and that the last that I've seen him and then I went back to sleep and woke up in the morning and came into work and his wife was in my office wanting to know where he was, I didn't know where he was. Then the girls mother, Pam Lilly called me at the office. Said Sgt. Clifford picked her up at 11:30 I believe it was the day before at the library and the girl had never returned.

Q: You're starting to put two and two together now?

A: Exactly. So when that happened I new something was up for sure so I called Captain Botti and for certain they came down and started talking to Sgt. Clifford.

Q: Sgt. Blevins was also in the pub with you that night?

A: Right.

Q: He apparently stayed longer than you?

A: Yes. Well he arrived I think at 8:30 and that's right when I left.

Q: Now most of the people that work at that pub they know you guys?

A: Yes sir.

Q: I guess being close buy you guys go there for lunch a lot too don't you?

A: Yes sir.

Q: It's not unusual for recruiters I'm assuming to take potential recruits to lunch?

A: Lunch.

Q: Is it unusual for you to take them to a movie or entertain them in ways like that?

A: Yes that is. That's strictly forbidden sir.

Q: Oh it is?

A: Yes. We're authorized to take them to lunch if they're thinking about joining or we're authorized to buy them lunch but not movies and things of that nature. No sir.

Q: Is there anything that you would like to add to the statement Sgt. Adkins that you think is important that perhaps I've neglected to ask you?

A: I don't think so sir. Just that Mrs. Lilly, Pam Lilly when she called I had no idea what was going on but I mean I've never seen that girl before but I mean so I didn't know she was Sara Lilly but when the mother called me and I knew what happened to Sgt. Clifford that night then I started to put things together so then once I finally found out where Sgt. Clifford was Sgt. Clifford said that he had dropped, because I questioned him about it, I said, "Sgt. Clifford where is Sara Lilly because her mother called this morning"? and he said, "Well I took her to Angie's house last night and dropped her off", I said, "Okay" and I called Mrs. Lilly back and I said, "Look Mrs. Lilly Sgt. Clifford said that he dropped Sara off at Angie's house yesterday afternoon". She said, "Well I'm on my way to Angie's house right now". I said, "Okay could you please call me when you find your daughter or whatever"? and she said that she would. She never returned any of my calls. I mean I called her a bunch of times but she never returned any of my calls.

Q: Was there a time that Sgt. Clifford told you that the female that he was with in Griff's was the wife of a friend of his?

A: Yes sir. The next day, the first Sgt. questioned him. I was in there present for it and he told us that, because that's the first thing we asked was that Sara Lilly in there because her mother, we were worried about the daughter. And he said,

"No that was not Sara Lilly that was a friend's wife". He also stated that not only was the wife there her husband was there at the bar also too. But I never seen him. I never seen the guy that was with them just the girl.

Q: Would Sgt. Clifford have had permission, condoned permission to take Sara Lilly in the Army vehicle to a movie?

A: No sir. He would be authorized to drive her like to get her GED or to go over to Griff's and maybe have lunch but not to a movie or not to drink alcoholic beverages, no sir.

Q: Is everything you've told me been the truth Sgt. Adkins?

A: Yes sir it has.

Q: Would you testify to this court if asked to do so?

A: Yes I would.

STATEMENT CONCLUDES AT 10:35 HOURS

_____

SGT. FIRST CLASS RAYMOND ADKINS

WITNESS: _____

lmw 1-13-98

Charleston Area Medical Center
Charleston, West Virginia

FACE SHEET

PATIENT LAST, FIRST, MI	DOB	AGE
LILLY, SARA E	**03/04/80**	**17**
RB/LOC	ADM/REG DT/TIM	**MED RECORD#**
ROER-ROER	**12/31/97**	**004-4/-208**
ACCOUNT #	ADMIT SOURCE	**ADMIT CLERK**
3-84977-8	**EMERGENCY**	**JJB**
ADDRESS STREET	CITY	COUNTY
ROUTE 4 BOX 227	**ST. ALBANS**	**KAN**
ST	ZIP CODE	MS
WV	**25177**	**S**
ORIGIN	SEX	RELG
W	**F**	**BA**
AMD	PATIENT EMPLOYER	SOCIAL SECURITY NUMBER
N	**NONE**	**234-35-2513**
PHONE (HOME)	RESIDENT	NEAREST RELATIVE #1
304-/27-3419	**0000**	**LILLY, PAMELA**
SECOND TO NOTIFY	**ADDRESS #1**	ADDRESS
MILLER, OPAL	**ROUTE 4 BOX 227**	**ROUTE 4 BOX 227**
CITY	STATE	ZIP CODE
ST. ALBAN	**WV**	**25777**

REL	PHONE(HOME)	PHONE (WORK)
SV	**304-727-3419**	**304-348-4341**
REL	PHONE(HOME)	PHONE(WORK)
GC	**304-727-3419**	**- - -**
GUARANTOR EMPLOYER	ADDRESS #1	CITY, ST
CAMC/SHS	**MEMORIAL DIVISION**	**CHARLESTON, WV**
OCCUPATION	EMPLOYMENT STATUS	GUARANTOR #1
RN	**EMPLOYED FULL TIME**	**LILLY, PAMELA**
ADDRESS	CITY, ST	ZIP CODE
ROUTE 4 BOX 227	**ST. ALBANS, WV**	**25177-**
REL	SOCIAL SECURITY NUMBER	PHONE NUMBER
03	**236-88-5627**	**304-272-3419**
DOB	CARRIER 1 # NAME	INSURED'S NAME
05/04/54	**CARELINK HMO (1997)**	**LILLY, SARA**
CARRIER PLAN CODE	STREET	CITY, ST, ZIP
0402-1000 402	**P.O. BOX 631**	**CHARLESTON, WV 25322-**
CONTACT	ID#/CERT.#	SEX, REL
304-348-2922	**23688562703**	**F, 01**

ATTENDING PHYSICIAN	REFERRING PHYSICIAN	PRIVATE PHYSICIAN
904 **EWING,** **KIMBERLY F.**	**9010** **None**	**311** **HAYES,** **RICHARD D.**
MEDICAL SERVICE/MED. DEPT.		
84-K-EMER ROOM/02 EMERGENCY		
OCCURRENCE CODES/DATES		
06 12/30/97 / /		
HOW ARRIVED	ADMITTING DIAGNOSIS	
CAR	**999999** **NOT SPECIFIED**	

ALLERGIES	TRIAGE TIME
Keflex	**1226**
TRIAGE	
NU	
PHYSICIANS ORDERS	**TIME/INITIALS**
⊠ **HCG**	**13138**
NURSING ORDERS	
TX area: PD 1250 RPR 13138 HIV ⊠Notify Police ⊠Notify soc.sec Consult Gyn for SA Work	

NAME	SEX	AGE
LILLY, SARA E.	**F**	**17Y**
T	P	R
X336	**92**	**18**

MEDICAL RECORD NO.	ACCOUNT NO.
004-472-06	**849775**
EMER PHY	VISIT DATE/TIME
KIMBERLY F. EWING	**12/31/97 1226**
PRIVATE PHYSICIAN	ER IN PAST 72 HRS
HAYES, RICHARD D.	**N**
CURRENT MEDS/DOSAGE	TRIAGE CHIEF COMPLAINT
Ø	**Pc27 sexual assault last pm**
TIME	SIGNATURE
1250	**/S/**

17 yr presents to ED c c/o being sexually assaulted s/p being at Griffs bar and getting drunk c and army recruiter and he took her to a motel and had unconsented sex with her. She states she was "really drunk" and didn't know what she was doing. She is amnesic to events. Took place @ 48 states motel room. #3.	
Denies Allergic to Keflex Ø admits	
X smoker - ppd x 2yrs	
Ø n/v/d	
Ø BIBSXSS	
ASSESSMENT	
Alleged sexual assault	
PHYSICIANS ORDERS	
---------- }	**1610**
CONDITION ON DISPOSITION	DISPOSITION
☒ **SAME**	☒**DISCHARGED**
INSTRUCTIONS GIVEN TO PATIENT	
P/L hour Flx logan pmn	
PHYSICIAN SIGNATURE	
/s/LS	

725 Jefferson Road, South Charleston,
West Virginia 25309-1698
September 8, 1998

CPL. R. L. WEST
SHERIFF'S DEPARTMENT LAB NO. S9800014
PO BOX 75087
CHARLESTON WV 25375

This examination has been made with the understanding that the evidence is connected with an official investigation of a criminal matter and that the Laboratory report will be used for official purposes only, related to the investigation or a subsequent criminal prosecution. Authorization cannot be granted for the use of the Laboratory report in connection with a civil proceeding.

REFERENCE: Mark Alan Clifford-Suspect
Sara Lilly-Victim
Sexual Assault (2nd Degree)
12/30/97

EVIDENCE RECEIVED: 01/12/98 via personal delivery by Det. West

EVIDENCE DISPOSITION: Cuttings retained; items attached

EXAMINATION REQUESTED: Semen identification

SPECIMENS: One (1) sex crime evidence kit
One (1) sweatpants
One (1) sweatshirt
One (1) blue jeans
One (1) tee shirt

RESULTS OF EXAMINATION:

Low levels of spermatozoa were identified on the sweatpants. No semen was identified on the remaining items. Cuttings from the sweatpants were retained for possible future testing. No blood was indicated on the submitted items.

Known blood (EDTA tube) and saliva specimens from accused individuals should be submitted for DNA analysis if additional information is desired.

Sincerely,

H.B. Myers
Forensic Scientist

HBM/sb
Attachment

FILED
MAY 24 2002
OFFICE OF THE CLERK

No. 01-1404

In the Supreme Court of the United States

SARA ELIZABETH LILLY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

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Washington, D.C. 20530-0001
(202) 514-2217

14pgs

QUESTIONS PRESENTED

1. Whether under West Virginia law the government had a duty to prevent an Army recruiter from sexually assaulting a prospective recruit during non-duty hours and on non-military premises.

2. Whether a plaintiff can avoid the statutory bar under the Federal Tort Claims Act on recovery for claims arising out of assault and battery, 28 U.S.C. 2680(h), by pleading that the government was negligent in supervising the government employee who committed the assault or battery.

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In the Supreme Court of the United States

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is unpublished, but the decision is noted at 22 Fed. Appx. 293 (Table). The opinion of the district court (Pet. App. 3-12) is reported at 141 F. Supp. 2d 626.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 2001. The petition for a writ of certiorari was filed on March 20, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This is an action under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.* (1994 & Supp. V 1999), alleging that the United States negligently failed

to prevent a sexual assault perpetrated on petitioner by an Army recruiter. Petitioner, who was 17 years of age at the time of the pertinent events, alleges that she contacted the Army recruiting office in South Charleston, West Virginia, about joining the Army. Sergeant Mark Clifford, an Army recruiter, arranged for petitioner to take the GED test, and drove petitioner to the exam site. When the two arrived, they found the building closed. Petitioner and Sgt. Clifford then had lunch together, saw a movie, and later went to a restaurant where Sgt. Clifford purchased several alcoholic drinks for petitioner. She became drunk and passed out. Sgt. Clifford then carried her out of the restaurant, drove her to a motel in a government vehicle, and had sexual intercourse with her. Pet. App. 3-4.[1]

2. Petitioner brought this suit against the United States under the FTCA, alleging that the Army negligently breached its duty to protect her from its recruiter. Pet. App. 20-23. The district court granted the government's motion to dismiss. *Id.* at 3-12. The court held that this action is barred by 28 U.S.C. 2680(h) because it "arises out of an assault [or] battery." Pet. App. 11. The court noted that *Sheridan* v. *United States*, 487 U.S. 392, 403 n.8 (1988), left open the question of whether claims that the government negligently hired, trained, or supervised one of its employees who committed a foreseeable assault or battery could ever be actionable under the FTCA. Pet. App. 8. But, the court recognized, the Fourth Circuit has held that such claims are barred under Section 2680(h) of the FTCA. *Ibid.*

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[1] Sgt. Clifford was subsequently indicted for second-degree sexual assault, a felony, under West Virginia law. C.A. App. 193-194.

The district court also rejected petitioner's claim that the government had undertaken and breached an affirmative duty to protect her. Pet. App. 9-11. Acknowledging that *Sheridan* had held that such claims are not necessarily barred by the assault and battery exception to the FTCA, the district court held that a plaintiff must establish that the government "breached its duty to the plaintiff through an act of negligence by a federal employee other than the intentional tortfeasor and such act was independent of the intentional tort." *Id.* at 9. Here, the district court stated, the only alleged breach of a duty "occurred when Clifford committed the intentional tort," and "[i]t is impossible to separate Clifford's intentional acts from any negligent acts of the United States." *Id.* at 10. Accordingly, the district court concluded, "[e]ven if the United States did assume an affirmative duty of care toward the plaintiff, the plaintiff cannot show that the United States breached that duty independent of Sergeant Clifford's intentional acts, and the United States is not liable for the intentional torts of its employees." *Id.* at 10-11.

3. The court of appeals affirmed in an unpublished opinion based "on the reasoning of the district court." Pet. App. 2.

ARGUMENT

The unpublished decision of the court of appeals is correct and does not conflict with any decision of this Court. Except for the Ninth Circuit, every court of appeals that has considered the issue since *Sheridan* v. *United States*, 487 U.S. 392 (1988), has held that a plaintiff cannot avoid the FTCA's bar on recovery for claims arising out of assault or battery by pleading that the government negligently supervised the alleged assailant. Although the Ninth Circuit has disagreed

with the other circuits, the unpublished decision below does not deepen the conflict. Moreover, this case is not an appropriate vehicle to resolve the conflict because there is an adequate state-law ground supporting the judgment. In addition, this Court has recently declined review in other cases presenting the same negligent-supervision issue. *English* v. *United States*, 122 S. Ct. 64 (2001); *Foster* v. *United States*, 532 U.S. 904 (2001). There is no reason for a different result here.

1. The FTCA provides the exclusive remedy for tort actions against the United States, but only to the limited extent that the FTCA clearly and explicitly waives sovereign immunity. 28 U.S.C. 2679(a) and (b)(1). In providing this remedy, Congress expressly barred recovery for a number of intentional torts, including "[a]ny claim arising out of assault [or] battery." 28 U.S.C. 2680(h).

This Court considered the scope of the intentional tort exception in *Sheridan* v. *United States*, 487 U.S. 392 (1988).[2] The Court held that claims based on a duty

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[2] Prior to *Sheridan*, the four Justices who reached the issue in *United States* v. *Shearer*, 473 U.S. 52 (1985), concluded that negligent-supervision claims are barred under the FTCA. Those Justices reasoned that a plaintiff

> cannot avoid the reach of § 2680(h) by framing her complaint in terms of negligent failure to prevent the assault and battery. Section 2680(h) does not merely bar claims *for* assault or battery; in sweeping language it excludes any claim *arising out of* assault or battery. We read this provision to cover claims like respondent's that sound in negligence but stem from a battery committed by a Government employee.

473 U.S. at 55. Three Justices concurred in the judgment and the remainder of the opinion, but did not join this part of the opinion. Justice Marshall concurred in the judgment only. Justice Powell took no part in the decision.

that is independent of the assailant's employment status, such as a duty to protect a victim or a good-samaritan duty, are not barred by the assault and battery exception where the assailant (1) is not a federal employee or (2) is a federal employee but is acting outside the scope of his employment. *Id.* at 400-401. In such circumstances, "the negligence *of other Government employees* who allowed a foreseeable assault and battery to occur may furnish a basis for Government liability that is entirely independent of [the assailant's] employment status." *Id.* at 401 (emphasis added). The Court remanded in *Sheridan* for a determination of whether the government had breached a duty owed to the plaintiffs under state law by having adopted regulations prohibiting firearms on the naval base or by "voluntarily undertaking to provide care to [the assailant] who was visibly drunk and visibly armed." *Ibid.*

The Court in *Sheridan* expressly declined to consider whether claims based on an employment relationship (negligent hiring, supervision, or training) are barred by the assault and battery exception. 487 U.S. at 403 n.8. In a concurring opinion, Justice Kennedy stated that he would have reached that issue and would have held that a plaintiff may not maintain a claim based only on the employment relationship between the intentional tortfeasor and the government. *Id.* at 408 (Kennedy J., concurring). "Otherwise," Justice Kennedy explained, "litigants could avoid the substance of the exception because it is likely that many, if not all, intentional torts of Government employees plausibly could be ascribed to the negligence of the tortfeasor's supervisors." *Id.* at 407. The dissenting Justices also would have held that negligent-supervision claims are

barred. *Id.* at 411 (O'Connor, J., joined by Rehnquist, C.J., and Scalia, J.).

2. The courts below correctly held that petitioner did not allege a claim that would allow recovery under the FTCA. Apart from general allegations that the Army negligently supervised Sgt. Clifford (see Pet. App. 21-23), in the district court petitioner did not identify any government employee other than Sgt. Clifford who breached a duty owed to her. See *ibid.*; *id.* at 10-11. In this Court, too, petitioner argues that the government created a "special relationship" with her "when Clifford picked up [petitioner], a minor, took her to the GED exam, * * * and promised to deliver her back to her mother once the test was completed." Pet. 11. As the district court correctly recognized (Pet. App. 10-11), however, because those allegations were tied only to the conduct of the alleged intentional tortfeasor, they cannot provide a basis for government liability under *Sheridan*.

In this Court, petitioner seeks to satisfy the *Sheridan* standard by alleging that Sgt. Clifford's commanding officer knew of his previous "behavioral problems" and described him as "quirky"; Sgt. Clifford had previously made sexual advances to another female recruit; and other recruiting sergeants were present at the restaurant when petitioner became drunk. Pet. 17. Whether any of those actions could constitute a negligent breach of a duty owed to petitioner is an issue of West Virginia law (see 28 U.S.C. 1346(b)(1) (1994 & Supp. V 1999)), and this Court ordinarily does not examine such fact-specific, state-law issues in the first instance. See *Sheridan*, 487 U.S. at 401. Moreover, petitioner did not raise those arguments in district court. Accordingly, the arguments were not properly before the court of appeals, and are not properly before this Court. See

Grupo Mexicano de Desarrollo, S.A. v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 n.3 (1999).

In any event, these alleged acts would not provide a basis for tort liability under West Virginia law. That State follows the doctrine that, "[g]enerally, a person does not have a duty to protect others from the deliberate criminal conduct of third parties." *Miller* v. *Whitworth*, 455 S.E.2d 821, 825 (W. Va. 1995) (citing Restatement (Second) of Torts § 302B, cmt. d (1965)). *Miller* held that this general principle would not apply "(1) when a person has a special relationship which gives rise to a duty to protect another person from intentional misconduct or (2) when the person's affirmative actions or omissions have exposed another to a foreseeable high risk of harm from the intentional misconduct." *Ibid.* (citing Restatement (Second) of Torts §§ 302B, cmt. e & 315).

Petitioner argues that the government had an affirmative duty to protect her because of her status as a prospective recruit and because the government "took charge" of her. Pet. 7-12, 17-18. There is no basis, however, for imposing such an affirmative duty in this case. The brief, unspecific remarks of Sgt. Clifford's commanding officer that he was "quirky" and had had "behavioral problems" do not indicate that the commander should have foreseen Sgt. Clifford's criminal act. Moreover, any duty arising from the commander's knowledge of Sgt. Clifford would be related to his employment status and thus not the kind of independent duty required under *Sheridan*. Similarly, the statement by another prospective recruit that Sgt. Clifford had made unwanted sexual advances toward her also provides no basis for government liability. Indeed, that prospective recruit specifically stated that she did not report this incident to the Army. Pet. App. 132.

Finally, the government cannot be held liable based upon the actions of the other sergeants. They were not acting within the scope of their employment when they were at the restaurant that Sgt. Clifford and petitioner visited that night. See Pet. App. 63, 135, 138. The undisputed facts also show that the other sergeants arrived separately from Sgt. Clifford and petitioner, were in a different section of the crowded restaurant, and did not know petitioner or that she was a potential recruit. *Id.* at 63-65, 136-139. Thus, these sergeants did not take charge of petitioner, create a special relationship with her, or expose her to a high risk of Sgt. Clifford's intentional misconduct, so as to render them liable under West Virginia law.

The facts of this case contrast markedly with those in the cases on which petitioner relies (Pet. 14-16), where the courts found an independent duty on the part of the government to protect the victim of a battery. For example, *Doe* v. *United States*, 838 F.2d 220 (7th Cir. 1988), held that the government had a duty to protect children in an Air Force daycare center from sexual abuse by an unknown assailant. As discussed above, there is no comparable basis in this case for holding that the government assumed a duty to protect petitioner from Sgt. Clifford's criminal act.

3. The holding of the unpublished decision below that a plaintiff cannot evade the intentional tort exception by alleging that the government negligently hired, supervised, or trained the assailant also does not warrant review. With the exception of the Ninth Circuit, every court of appeals that has considered the issue since *Sheridan* has held, consistent with the decision of the Fourth Circuit below, that the statutory bar on recovery for claims arising out of assaults and batteries cannot be circumvented by pleading that the

assault or battery that injured the plaintiff was caused by the government's negligent supervision. See, *e.g.*, *Billingsley* v. *United States*, 251 F.3d 696, 698 (8th Cir. 2001) (barring claim of negligent supervision of a Job Corps enrollee if the battery he committed occurred within the scope of his employment and government did not breach a duty unrelated to employment relationship); *Leleux* v. *United States*, 178 F.3d 750, 757 (5th Cir. 1999) (barring claim of negligence against United States in seduction of recruit by Navy serviceman because negligence did not arise out of "an independent, antecedent duty unrelated to the employment relationship between the tortfeasor and the United States"); *Perkins* v. *United States*, 55 F.3d 910, 916-917 (4th Cir. 1995) (rejecting "negligent supervision" and "negligent retention" claims); *Franklin* v. *United States*, 992 F.2d 1492, 1498-1499 (10th Cir. 1993) (barring claim of negligence against United States in case of medical battery by VA hospital employee because claim was contingent on employment relationship); see also *Guccione* v. *United States*, 847 F.2d 1031, 1034 (2d Cir. 1988) (barring claim that United States was negligent in failing to supervise undercover agent because claim was not independent of employment relationship), cert. denied, 493 U.S. 1020 (1990).[3]

In any event, this case is not an appropriate vehicle for the Court to resolve the one-sided conflict between the Ninth Circuit and the other courts of appeals that

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[3] The Ninth Circuit has held that the statutory bar on recovery for claims arising out of assaults and batteries can be avoided by pleading that the assault or battery that injured the plaintiff was caused by the government's negligent supervision or hiring. See *Senger* v. *United States*, 103 F.3d 1437, 1442 (9th Cir. 1996); *Brock* v. *United States*, 64 F.3d 1421, 1425 (9th Cir. 1995); see also *Bennett* v. *United States*, 803 F.2d 1502, 1503-1504 (9th Cir. 1986).

have considered the question. The unpublished opinion below does not contribute to the disagreement, and it is supported by an adequate state-law ground. As discussed above, the undisputed facts show no special circumstance to take this case outside West Virginia's general rule that a person is not liable for another person's deliberate criminal act. In addition, this Court has declined review in recent cases presenting the negligent-supervision issue. See *English* v. *United States*, 122 S. Ct. 64 (2001); *Foster* v. *United States*, 532 U.S. 904. (2001). This case calls for the same result.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

ANTHONY J. STEINMEYER
Attorney

MAY 2002